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REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,
EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1857, 1858 AND 1859.

Queen's Bench;

By WILLIAM M. JOHNSON, Esq. AND THOS. BRUNKER, Esq.

Common Pleas;

By B. L. FLEMING, Esq. AND SAMUEL V. PEET, Esq.

Exchequer;

By JAMES A. KIFT, Esq. AND SAMUEL WALKER, Esq.

Exchequer Chamber;

By WILLIAM M. JOHNSON, Esq. B. L. FLEMING, Esq.
AND JAMES A. KIFT, Esq.

Court of Criminal Appeal;

By JOHN O'LEARY, Esq.

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NOTE.—The Cases in the Queen's Bench, and the Appeals and Cases in Error therefrom, commencing with *Coghlan v. Callaghan* (7 Ir. Com. Law Rep. 291), together with the following Cases in the same volume, viz., *The Queen v. Ward* (p. 324), *The Queen v. Roberts* (p. 325), *Deering v. Lawler* (p. 333) are reported by Messrs. W. M. JOHNSON and T. BRUNKER.

CORRIGENDUM.

Page 504, last line, for "H. L. Cas. 106," read "3 H. L. Cas. 106."

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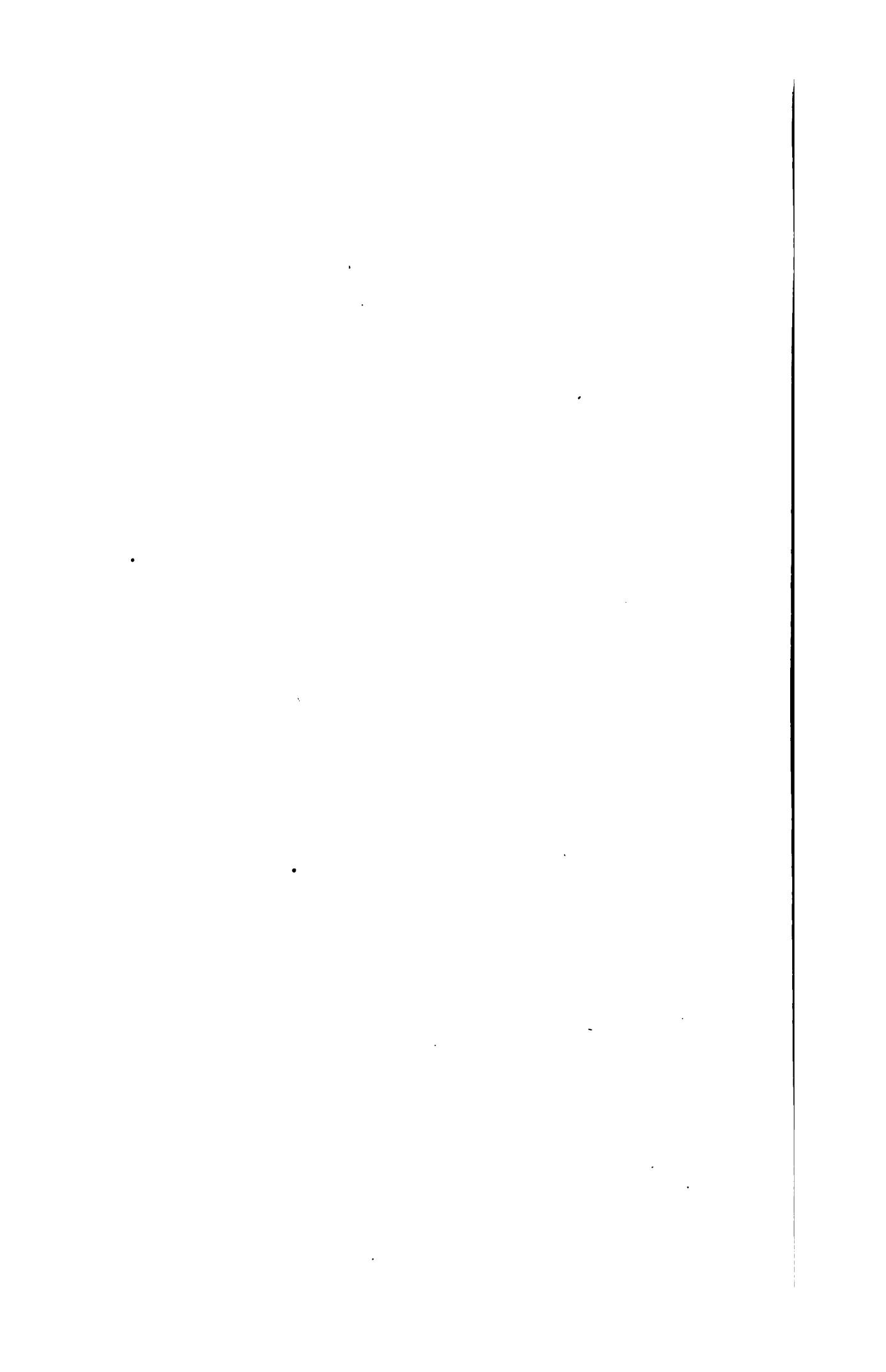
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COMMON LAW REPORTS,

OF CASES ARGUED AND DETERMINED IN

THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

Exchequer Chamber

AND

COURT OF CRIMINAL APPEAL.

EXCHEQUER CHAMBER.

DELACHEROIS v. DELACHEROIS.*

(*Error from the Court of Common Pleas.*)

H. T. 1858.

Exch. Cham.

Jan. 5, 6, 11.

THIS was an action of ejectment upon the title, tried before Mr. Justice Ball, at the Summer Assizes of 1856, for the county of Down, and was brought to recover the possession of the lands of Ballyhaise. The facts were as follows:—In the year 1836 (and before the passing of the Wills Act), Daniel Delacherois, deceased, made his will, bearing date the 3rd of March, by which he devised all his real estates in the county of Down, or elsewhere, to two trustees and their heirs, in trust for his sister Mary Delacherois, for life, with power for her to appoint the same to the children of Samuel Delacherois, the testator's brother, for life, with remainders to the first and other sons of such children, in tail. Subsequently to

A, lord of a manor, by his will, made on the 3rd of March 1836, and containing words sufficient to pass the manor, devised his real estate in trust to B. Subsequently to the date of his will, he purchased certain lands which had originally formed portion of the manor.—
Held, that the

lands were not so re-annexed to the manor by the purchase as to pass under the devise.—(Pigot, C. B., dissentiente.)

Sembler.—They may be so re-annexed by escheat. *Sembler*.—The rents and services may be re-annexed by purchase.

* Coram LEVROU, C. J., PIGOT, C. B., PERRIN, CRAMPTON, JJ., RICHARDS and GARNETT, BB.

H. T. 1858. the date of this will, the testator Daniel Delacherois purchased the
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~~DELACHEROIS~~ lands which were the subject-matter of the present action, and which were conveyed to him by a deed bearing date the 1st of March 1842; whereby J. H. Bradshaw conveyed the same, which he held in fee-farm, to the testator and his heirs. Under the latter deed it appeared that the lands in question were liable to a chief rent of £2 per annum, and the conveyance of the land was subject to that rent. The testator died on the 1st of October 1850. Mary Delacherois entered into possession as tenant for life, and by her will, bearing date the 4th of June 1852, she exercised the power of appointment created by the testator's will, in favour of the defendant and his issue. The plaintiff in the present action was the eldest son of Samuel Delacherois, the testator's brother, and the defendant was his second son. The latter entered into possession after the death of Mary Delacherois. The plaintiff's case at the trial chiefly rested upon the above facts, which were not disputed by the other side. The defendant relied upon the following facts, viz.:—That the lands in question had formed a portion of the manor of Donaghadee, and that the testator, at the time of making his will, was lord of the manor; and that the language of the will was sufficient to pass the manor; and that he having subsequently purchased these lands, which had been part and parcel of the manor, they became thereby re-annexed to the manor, and passed under his will as parcel of such. To sustain this case, the defendant gave in evidence a patent of the reign of *Car. 1*, dated 1625, and made to Lord Viscount Montgomery, under which the manor of Donaghadee was created, with power of inféudation, in fee-simple or fee-tail, to be held of Lord Montgomery, notwithstanding the Statute of *Quia Emptores*. He also gave in evidence several deeds and wills, under which he deduced the testator's title to this manor, and he examined several witnesses to prove the holding of a *Manor Court*, the appointment of seneschals from time to time, and the attendance of the tenants of Ballyhaise as jurors at the *Manor Court*. He also proved that Daniel Delacherois had occupied from 80 to 100 acres of demesne lands, and that there was an old castle of Donaghadee. At the close of the defendant's case, his Counsel, who sought to establish the

existence of a manor, called upon the learned Judge to direct the jury to find for the defendant, upon the authority of the following passage from 2 *Shep. Touch. (Preston)* :—“If there be lord and tenant, and the lord purchase the tenancy, by this means the services are released, and extinct at law, and the lands become parcel of the manor, and pass under that denomination, and may pass inclusively with the manor, by a will made prior to the purchase of the tenancy. So if the tenant purchase the services, they are extinguished in the tenancy, if he have equal estates in the tenancy and services.” The plaintiff, on the other hand, contended that the lands, having been once disconnected from the manor, could not be re-annexed thereto by any subsequent purchase, upon the authority of 12 *Mod.*, p. 138, in which it is laid down that “A tenancy escheated to the lord becomes part of the manor; but if the lord purchase part, it is only holden of the manor, and not part of it, but the rent and services are part.”

The learned Judge told the jury that, if they believed the evidence, they should find a verdict for the plaintiff. To this direction the defendant’s Counsel excepted, and called upon the learned Judge to direct a verdict for the defendant upon the evidence, which his Lordship refused to do.

This case was argued in Michaelmas Term 1856, and Hilary Term 1857, in the Court of Common Pleas, upon a bill of exceptions to the charge of the learned Judge who tried the case, and that Court gave judgment in Easter Term 1857, overruling the exceptions.

A writ of error having been brought, the case was argued in the Court of Exchequer Chamber in Easter Term 1858, by—

Hugh Law and *Gerald Fitzgibbon*, for the plaintiffs in error, and by—

Andrew Vance and *Joseph Napier*, for the defendant in error.

The cases and authorities cited in the arguments of Counsel are fully referred to in the judgment of the Court.

Cur. ad. vult.

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E. T. 1858.

Esch. Chanc.

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April 20.

GREENE, B.

This was an ejectment brought for the recovery of one-third part of the town and lands of Ballyhaise, formerly in the possession of Joseph Hore Bradshaw, and afterwards in the possession of Daniel Delacherois, deceased. It was tried before my Brother Ball, at the Summer Assizes for the county of Down, in the year 1856, when a verdict was found for the plaintiff, after a charge of the learned Judge, to which exceptions were taken on the part of the defendant. These exceptions were, upon argument, overruled by the Court of Common Pleas, which gave judgment in favour of the plaintiff. Error has been alleged in this judgment by the defendant, and it is for this Court now to say whether the judgment is erroneous.

The plaintiff is the elder, and the defendant the younger, son of Daniel Delacherois, deceased. The former claims as the heir-at-law, and the latter as devisee of Daniel Delacherois. In support of his case, the plaintiff simply proved his heirship, and a deed of the 1st of May 1842, whereby the premises in question were conveyed in fee-simple by Joseph Hore Bradshaw to Daniel Delacherois, in consideration of a sum of £7000. In this deed the lands are described as "all that and those one-third part of the town and "lands of Ballyhaise, in the possession of J. H. Bradshaw or his "undertenants, situate, lying and being in the manor of Donagh- "adee, otherwise Montgomery, in the barony of Ards and county of "Down."

The defendant relied upon a will of his father Daniel Delacherois, dated the 3rd of March 1836, whereby the testator devised "all his real and freehold estates in the county of Down or elsewhere, whereof he should die seised, possessed or entitled to:" under the limitations of which will he contended he was entitled. The answer to this case on the part of the plaintiff is, that as the testator did not become seised of the lands in question until the year 1842, which was six years after the execution of the will, these lands did not, according to the law which was in force in 1836, when the will was made, pass by the general devise, and

consequently that the lands descended to the plaintiff as heir-at-law E. T. 1858.
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It is not disputed on the part of the defendant, that such was the rule of law at the date of the will; but he contends that, in point of law and fact, Daniel Delacherois the testator was, at the time of making his will, seised of the lands in controversy, and that they were then part of his real and freehold estates in the county of Down, within the true intent and meaning of the original Statute of Wills, and of the cases decided with respect to it, so far as relates to the necessity of a seisin in the testator at the time of the making of the will.

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The foundation of this argument is, that it appears from the evidence that there is a manor of Donaghadee, otherwise Montgomery, of which the lands in question were originally parcel, as demesne lands; that by deed, dated the 5th of January 1721, they were conveyed by the then lord of the manor in fee-farm; that although they thereby ceased to be demesne lands or parcel of the manor, and became severed therefrom, yet the manor itself remained in the grantor, the lord becoming entitled to the services of the lands, as owner of the manor, in lieu of the lands themselves; that these services represented or were a substitute for the severed lands, and were vested in the testator as part of the manor, as any other of its manorial rights, and in his seisin at the time when he made his will; that the testator being thus seised of the manor and services, the effect of his purchase from Bradshaw, in 1842, was to extinguish his seignory, and to re-annex the lands to the manor, so as to make them again parcel of the demesne. That the services being thus extinguished, and, as it were, merged in or identified with the lands, it follows that what was vested in the testator at the time of the will was in point of fact the same thing as the land, the only difference being in the quality of the thing, and not in the estate—just as if the lands had escheated, or the testator had devised an estate which at the time of the devise was only a reversion, and would not entitle the devisee to the possession, and the lease should afterwards expire in the testator's lifetime; so that in this way Daniel Delacherois had in 1836, in effect and in point of law, an

E. T. 1858. estate in the lands sufficient to give efficacy to a will purporting to
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devise all his real estate.

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The defendant produced a great body of documentary evidence, in order to establish the fact that Donaghadee was a manor, and that the lands in question had been originally part of the demesne lands, and so parcel of it; that the manor had never been extinguished by the alienation of all the demesnes, and other matters necessary to sustain the allegation that the grant of 1842 was a re-annexation of lands once belonging to the manor. But as the Counsel for the plaintiff have argued the case upon the assumption (although not the admission) that there was a manor, and have confined themselves simply to the case that, even supposing these lands had been originally parcel of a manor, and had been severed, and were afterwards re-conveyed to the lord of the manor, yet the effect of such re-conveyance was not to render the lord seised of the lands at the time of his will, so as to make the will include the lands, or authorise the testator to devise them, it is unnecessary to advert in detail to the nature or effect of the documentary evidence to which I have referred.

It was firmly settled, with respect to wills made previously to the late Wills Act, that devises of real estate were to be understood as speaking at the time of the execution of the will, and not of the death of the testator; that the Statute of Wills used the word "seised," or "having," with reference to the period of the execution of the will, and consequently that a testator could not devise anything of which he was not then seised. Lands, therefore, subsequently acquired by him could not pass under the general terms "all my estates." This was solemnly decided in *Brunker v. Cooke*, reported in *Fitzgibbon* and several other books, and subsequently confirmed in various cases; and indeed it has been fully conceded in the present argument. The sole question, therefore, in this case is, whether Daniel Delacherois was, on the 3rd of March 1836, so seised of this one-third part of Ballyhaise, that it passed as portion of his estates in the county of Down, under his will of that date? or whether that third of Ballyhaise, that is, the estate in the land,

was acquired by him subsequently to the will, namely, in 1842, when it was conveyed to him ?

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The defendant's Counsel contended that as Daniel Delacherois was, when he made his will, seised of the manor, then consisting of certain demesne lands, and of the services arising out of Ballyhaise, then holden of the manor; and as the manor, thus consisting partly of demesne lands and partly of the services of Ballyhaise, would have passed under the will, the same manor consisting, at the death of the testator, of Ballyhaise as demesne lands, with its other parcels, must also pass, the demesnes of Ballyhaise standing in lieu of the services, by virtue of the annexation of the lands to the manor, by of the purchase of 1842, just as if in that year the demesne lands had *escheated* to the lord; in which case, according to decided authorities, the will would have operated upon those lands. This alleged annexation of the tenemental lands to the manor is, it is asserted, to have a retroactive effect, and to operate as it were by way of relation, as from the date of the will, and, in point of law and substance, to place the estate in the lands *then* in the seisin of the testator.

It seems to be sufficiently established that if the lord of a manor devise his manor, then consisting of tenemental lands and of services, and afterwards any of the tenemental lands *escheat* to the lord during his life, either for want of heirs or *ob delictum tenentis*, such escheated lands will pass under the will as parcel of the manor. It is so laid down by Lord Holt, in *Bunker v. Cooke* (*a*); *Fitzgib.*, p. 231; 1 *Salk.*, p. 238; *Holt*, pp. 247-8. In *Brett v. Ridgen* (*b*), it is said, *arguendo*, "If a man makes his will the 1st of May, and thereby gives to another the manor of Dale in fee-simple, and the 10th of May one of the tenancies *escheats* to the manor, and the 20th of May the devisor dies, now the devisee shall have the tenancy escheated." This proposition is recognised in *Shep. Touch.*, p. 439, and other authorities establish the same principle.

We may then take for granted that by a devise of a manor, a tenancy *escheated* to the lord in the interval between the making of the will and the death of the testator will pass. But the question

E. T. 1858. is, whether the same rule applies to a tenancy not escheated, but
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 purchased by the lord after the date of the will? There seems to be a distinction in point of principle between the two cases. By the devise of a manor, anything incident to the manor will pass: 3 *Rep.*, p. 32, *b*. One of these incidents is the possibility of an escheat. In truth an escheat partakes of the character of a reversion. The form of the writ of escheat, in *Fitzh., N. B.*, pp. 338 (144), is as follows:—"Command A that he render to B ten acres of land in "N, which C held of him, and which ought to revert to him "the said B as his *escheat*," &c. In *Burgess v. Wheate* (*a*), the Master of the Rolls says:—"An escheat was in its nature feudal. "A feud was the right which the tenant had to enjoy lands, &c., "rendering to the lord the duties and services rendered to him "by contract. On the other hand, a right remained in the lord "(after a grant made), called a *seignory*, consisting of services to "be performed by the tenant, and a right to have the land returned "on the expiration of the grant, as a *reversion*, a right afterwards "called an *escheat*." And again (*b*):—"In default of heirs, the land escheated or reverted, strictly speaking." Further, "The reverter took place when the grant expired naturally." He afterwards says (p. 193), that the books afterwards omitted the title of original reverter, and that the escheat was said to be a compensation to the lord for the loss of his services. So, in the same case (p. 227), Lord Mansfield thus expresses himself:—"It has been truly said that in the beginning of feudal tenures this right was a *strict reversion*. The grant determined by failure of heirs, and the land returned as it did upon the expiration of any less temporary interest." In 3 *Cruise's Digest*, p. 491, it is laid down:—"An escheat was therefore in fact a species of reversion, and is so called and treated by *Bracton*, p. 23, *a*." In the learned note to 5 *M. & R.*, p. 157, cited in the argument, the editor thus states the nature of an escheat:—"Before the Statute of *Quia Emptores*, a tenant in fee-simple might have created a tenure under himself, as large in point of duration as his own estate; and in case of an entry upon the sub-tenant in fee for

(*a*) 1 *Eden*, 191.

(*b*) *Ibid.*

"a forfeiture before or since the statute, the lord is said to be E. T. 1858.
 "in of his *reversion* :" and in *Porter v. French* (a), my LORD Exch. Cham.
 CHIEF JUSTICE has clearly shown that the possibility of escheat was DELAChEROIS
 a sort of right of reverter. v.
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That it was upon this principle that a devise of a manor was held to pass lands escheated subsequently to the devise, and in the lifetime of the testator, appears probable from this, that Holt, C. J., in *Brunker v. Cooke*, instances this as one of a class of cases the rest of which are referrible to that principle. Thus he speaks (11 *Mod.*, p. 128), of a man being disseised and then making his will, and then re-entering and re-vesting his estate, in which case the re-entry operates *by relation*, and it is the same as if the testator had been seised at the beginning. And again (p. 129), he puts the case of a man seised in reversion making his will, and the estate tail or estate for life determining in his lifetime ; in that case the lands will pass, although there was only a reversion at the making of the will, *because he is seised at that time* as much as he can be.

In principle, therefore, there appears to be a distinction between the case of a tenancy *falling in* by way of escheat, as a matter or consequence of law, and the acquisition by the lord of a manor, by purchase, of a subsisting outstanding estate in tenemental lands holden of the manor. In *Knight's case* (*Moore*, p. 203), *per Petriam*, J. :—"If three acres are held by suit of Court, and the lord *purchase* one of the three, or grant his seignory of one over, the suit is gone for ever. But if one *escheat*, or be aliened in mortmain for which the lord enters, the suit remains for the residue." Here the distinction is between a *purchase* by the lord and his entry for an escheat or forfeiture. *Vin. Abr.*, *Manor*, F., pl. 3, note :—"A, seised of a manor, levies a fine of the demesnes; the manor is gone for ever; and though after the fine he is seised of his old estate again, yet he has it in another manner." The Statute of Marlbridge gives an action for waste committed on a farm, "or anything thereto belonging;" a tenancy escheated to a lessee of a manor, and it was held that the statute

E. T. 1858. extended to waste committed on it. "If there had been a farmer
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DELACHEROIS" for life or years of a manor, and a tenancy had escheated, this
"tenancy so escheated did belong to the tenements that he held
"in farm, and therefore this Act extended to it; and the lessor
"shall have generally a writ, and suppose a lease made of the
"lands escheated by the lessor, and maintain it by the special
"matter :" 2 Inst., p. 146.

It has been asserted, however, that there is direct authority for the proposition that, if the demesne lands of a manor be severed, and thus become tenemental lands holden of the manor, and the lord of the manor afterwards acquire by purchase such tenemental lands for an estate co-extensive with his estate in the manor, at least if such estate be a fee, those lands thereby become again parcel of the manor, as if never dissevered from it; and this to the extent not merely of annexing the lands to the manor for the time of the purchase, but indefinitely backwards, so as to give a will of the manor, however long previously made, the operation of passing the *corpus* of the land, although not in the seisin of the testator when the will was made. If there be such authorities, of course they decide this case in favour of the defendant.

Let us see then whether any such rule is fairly deducible from any of the cases cited. There has been a vast deal of learning brought to bear upon this case, and a great number of authorities have been cited to show the state of the feudal law in this country before the Statute of *Quia Emptores*, and the rules of the several countries abroad where the feudal law has been adopted. With respect to those matters, I may use the language of the Master of the Rolls, in *Burgess v. Wheate* (a). He says:—"In testing these points, one might expatiate into a curious field of learning, from the writers on allodial and feudal property; but as the doctrine of tenures was never wholly adopted into our Constitution, the different periods of our laws cannot be accounted for from a strict notion of feuds; so that it would be perplexing the case to go into the general learning." I do not deem it necessary, therefore, to

enter into the wide field of discussion, so ably occupied by the Bar, *E. T. 1858.*
with relation to the feudal system in general.

One class of cases relied on by Counsel for the defendant may, I conceive, be disposed of by the observation that they have no bearing on the present subject,—I allude to the cases of copyhold tenure. A copyhold, no matter of what estate, is considered at law as parcel of the manor. Copyhold cases have nothing in affinity with cases of tenemental lands, severed from or afterwards re-annexed to the manor. In *Roe v. Wegg* (*a*), it was held that, under a devise of a manor, copyhold premises, parcel of the manor which were purchased by and surrendered to the lord subsequent to the making of the will, passed to the devisee. Why? Because, in the eye of the law, the tenants of the manor (*i. e.*, copyhold tenants) are only *quasi* tenants at will of the lord. The lord is seised in fee of the whole; he had therefore, at the making of the will, the same estate which he had at his death, *viz.*, the freehold. But this cannot apply to tenemental lands, where the freehold is in the tenant. The like observations apply to *St. Paul v. Dudley* (*b*), *Doe v. Pott* (*c*), and other cases of a similar nature.

I shall next advert to another class of cases, on one of which, *viz.*, *Bingham v. Woodgate* (*d*), great stress has been laid. The simple question in that case was, whether the purchase by the lord of the manor, who was tenant for life of the manor, of the fee of three *customary tenements*, holden of the manor, was an extinction of those customary estates? and it was held that it was not; and on this ground, that extinguishment takes place only when the two estates have the same duration: in support of which proposition, the Master of the Rolls refers to sections 559, 560 and 561 of *Littleton*. True he goes on to say (what, not being necessary to the decision of the case, may perhaps be considered somewhat extra-judicial) that “if the lord had been seised in fee of the manor, then the union would have extinguished the customary tenements.” This is the part of the judgment relied upon to show that here was an extin-

(*a*) 6 T. R. 710.

(*b*) 15 Ves. 107.

(*c*) Doug. 710.

(*d*) 1 Buss. & Myl. 32.

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I have said that it was not decided in this case that the purchase of the customary tenement by an owner in fee of the manor would have been an extinguishment. Had that been the decision, it may be perhaps doubted whether it would have been in accordance with antecedent authorities. The Master of the Rolls founds his opinion or *dictum* upon the supposition that the customary tenements were freehold. It appeared to be the custom of that manor, that when the lord purchased a tenement, there should be not only a surrender, but also a bargain and sale. From this fact the Master of the Rolls draws the conclusion that the tenements so conveyed must be freehold; and upon this assumption it may be conceded that his *dictum* as to the union of the two estates in fee would be quite correct.

It appears to me, however, that this point is by no means clear; and I think it is difficult to reconcile with preceding authorities the assumption that the customary tenements in *Bingham v. Woodgate* were freeholds. This seems to have been one of a class of customary estates peculiar to the counties of Cumberland, Westmoreland and Northumberland, called "tenant-right estates," not copyholds in the ordinary sense, but in the nature of copyholds. These peculiar estates have been frequently the subject of discussion. In *Stephenson v. Hill* (*a*), it was held that the freehold of such estates is in the lord, no matter what the particular customs of the manor might be. So in *Burrell v. Dodd* (*b*), it was considered that these tenant-right estates were not freeholds. In *Doe v. Huntington* (*c*), Lord Ellenborough gives a history of these customary tenements, and says that although they are alienable, contrary to the usual mode by which copyholds are aliened, viz., by deed and admittance thereon, it seems to be settled that they are not freeholds, but that they in effect fall within the same consideration as copyholds; and he adds that the quality of their tenure in that respect cannot properly any longer be drawn into question. Such also seems to have been his opinion in *Doe v. Danvers* (*d*). No

(*a*) 3 Burr. 1273.

(*b*) 3 B. & P. 381.

(*c*) 4 East, 288.

(*d*) 7 East, 299.

man was better acquainted with this species of tenure than Lord E. T. 1858.
 Ellenborough, as he came from that part of the country in which it Exch. Cham.
 prevails, and for many years practised on the northern circuit. DELACHEROIS
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I say, therefore, that it may well be doubted whether the mere fact of one of these customary estates being alienable by way of bargain and sale is sufficient to show that such estate is a freehold. *Bingham v. Woodgate*, and other cases of that nature, would appear rather to belong to the same category as cases relative to copyhold estates, and to be as little applicable to the point for decision before us.

I come now to the authorities cited as directly deciding that a devise of a manor, of which tenemental lands are at the time of the devise held, will pass such lands, if afterwards purchased by the lord of the manor. I shall begin with a passage cited from Mr. Preston's edition of *Shepherd's Touchstone*, vol. 2, p. 334; it is as follows:—"If there be lord and tenant, and the lord purchase "the tenancy, by this means the services are released and extinct in "law." Then follows, included within brackets, this passage:—"And the lands become parcel of the manor, and pass under that "denomination, and may pass, inclusively with the manor, by a will "made prior to the purchase of the tenancy." This latter position rests on Mr. Preston's authority alone; it is not part of *Shepherd's* text, nor is it warranted by *Co. Litt.*, p. 264, to which *Shepherd* refers: it is simply his assertion that the purchase of the tenancy makes it parcel of the manor: and yet I find in the same book (1 *Shep. Touch.*, p. 90) this proposition:—"And if a man make "a feoffment in fee of an acre of land, parcel of a manor, and "after re-purchase it, and then grant the manor, this acre will not "pass by the grant, for it is not united by the new purchase;" the reason of which Mr. Preston himself gives in these words:—"For "lands once severed from a manor cannot become parcel of the "manor by any subsequent act." So far as the case depends upon Mr. Preston's authority, it appears to be sufficient to contrast one of these passages with the other.

The proposition that lands once severed from a manor cannot again become parcel of the manor, by purchase, appears to follow

E. T. 1858. from the case of *Thetford v. Thetford* (*a*), where Anderson, C. J.,
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says:—"If one seised of a manor maketh a feoffment in fee of part
"of the demesnes, and afterwards re-purchases them and then makes
"a feoffment of the whole manor, the demesnes re-purchased will
"not pass thereby, for they *were once severed from the manor, and*
"*are not reunited by the purchase;*" and a distinction is taken
between such a case of purchase and a devolution of estate by act
of law. Thus where co-parceners of a manor made partition of
the demesnes only, leaving the services of the feeholders and
copyholders in common, the same learned Judge said:—"By the
"partition the demesnes are now become in gross and severed from
"the manor; and if partition be made of a manor, so as the demesnes
"be allotted to one sister and the services to the other, now the
"manor is dissolved; yet if the one sister dieth without issue, and
"her part descendeth to the other, now is it become a manor again:"
which Periam and Windham granted.

So in 2 *Roll. Ab.*, tit. *Revivor*, H, the same case is put, of a
partition destroying the manor, and the death of one co-parcener
without issue; "in which case it shall be a manor again, *because it*
was rejoined by act of law."

The next case relied upon, in support of the position of a reunion
with the manor, to which I shall advert, is *Temple v. Cooke* (*b*).
I am unable to discover how this case bears upon the question
before us. Sir Robert Belknap was seised in fee of the manor
of Basset. He purchased certain freeholds of free tenants of the
manor. These lands lay scattered in the common fields of Basset,
intermixed with the demesne lands and other lands held by copy-
holders, leasees for years and tenants at will, so that the exact site
of the purchased lands was unknown. He left three co-heiresses,
who married respectively Sir A. Cooke, Sir E. Wotten and Dannet;
Wotten and Cooke, two of the parceners, then purchased another
similar freehold, which freehold came to Cooke as survivor. Dannet's
portion was sold to Temple. Temple then brought a writ
of partition against Cooke and the heir of Wotten of the manor
only. Judgment for partition was had, and a writ of partition

(*a*) 1 Leon. 204.

(*b*) 3 Dyer, 656; S. C., Jenk. Cent. 232.

directed to the Sheriff. Cooke then informed the Sheriff of the purchase of the freehold, which is not parcel of the manor, and cautioned the Sheriff not to make partition of *all* within the ring or fence; but he did not point out to the Sheriff where the freehold lands lay, of which the Sheriff was not to make partition. The only question then in the case was upon whom the *onus* lay of pointing out those specific lands—whether upon Cooke, who cautioned the Sheriff, or upon the plaintiff in the suit? and the Court thought it lay upon Cooke to do so. This is the whole of the case, and I do not see what application it has to the matter before us.

A case in *Saville*, 21, pl. 52, was also strongly relied upon by the defendant's Counsel. It is thus reported:—"Armiger of Gray's Inn moves this case in the Exchequer: J. S. holds a tenancy in "Dry Drayton of Thomas Hutton, as of his manor of Chambers, by "knight's service, which manor he (that is Hutton) holds over of the "Abbot of Crowland, as of the manor of C. (meaning of Crowland) "in Drayton, by like service, which manor of C. (Crowland) comes "to King *Hen.* 8, by the Act of Parliament for dissolution of "monasteries. Then the said Hutton purchases the said manor of "C. from the King, so that he was seised of the two manors (viz., "Chambers and Crowland), and died seised of both, whereupon they "descend to his son and heir John Hutton, in fee, who conveys both "manors to certain feoffees to the use of himself and Elizabeth his "wife, and the heirs of himself. He then purchases the tenancy "paravaile, and makes a feoffment of it to Henry Gifford; and "Armiger's question was, of whom the tenancy was holden (*i. e.*, "by Gifford)? " Manwood thus delivers judgment:—"When "Thomas Hutton purchased the manor of Crowland (*i. e.*, of the "King), he being also seised of the manor of Chambers, then the "seignory which was between the Abbot of Crowland and him is "extinct, and then the tenant paravaile holds of the manor of "Crowland, which was holden over of the King by knight's service; "then, when John Hutton made a feoffment of both manors to the "uses aforesaid, and then purchased the tenancy, it is become *parcel* "of the manor, and holden, as the manors were, of the King in "capite; and when he has enfeoffed Gifford, Gifford shall hold as

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DELACHEROIS" John Hutton, the tenant paravaile held of him and his wife; and
"although John Hutton afterwards purchased the tenancy, by which
"for the present the tenancy becomes *part of the manor holden of*
"*the King*, yet the seignory is not altogether extinguished as against
"the wife; wherefore, if John Hutton should die before his wife,
"the tenant shall hold of the wife during her life, because it is
"not reason that the purchase of the husband shall prejudice his
"wife. But if the limitation of the use of the manors had been
"before the marriage, then, by the purchase of the tenancy, a
"moiety of the seignory would be extinct, and the husband would
"hold the other moiety of the wife."

I do not collect from this case that a purchase by a lord of a manor, of a fee-simple holden of the manor, makes the purchased lands parcel of the manor. It is assumed that, after the purchase, the lands were still held, and the question was, of whom? The case appears only to decide that, in consequence of the wife's estate, the seignory was not extinguished.

Another case much relied upon was *Montague's case (a)*. The sole question there was how seven acres of land, called Oldfield, were holden after the death of Sir Walter Montague, who was seized of them, and of a manor of Warkton, held by him of the Crown *in capite*. These seven acres had been held in socage of the manor of Warkton, and were purchased by Sir E. Montague, the father of Sir Walter; and the question was how, after that purchase, they were holden, in point of law; that is, whether *in capite*, as the manor of which they had been theretofore holden was held? and it was decided that the seven acres were, after the purchase, held *in capite*. That decided that the tenure in socage was extinguished by the purchase, and the seven acres were to be holden of the Crown *as the manor was held*; but it was not decided that the seven acres became re-annexed to the manor or parcel of it, or that a grant or devise of the manor *per se* could have passed the seven acres.

Shep. Touch., p. 439, was also relied upon, in consequence of a

(a) Ley, 63.

dictum of Mr. *Preston*. The text is:—"If a man make his will "the 1st day of May, and thereby give the manor of Dale to one in "fee, and the 10th of May one of the tenancies escheat, and the 20th "of May the devisor dieth, in this case, and by this devise, it seems "the devisee shall have the tenancy that doth escheat." So far *Shepherd*, and so far the law, seem clear, viz., with respect to an escheat. But then comes Mr. *Preston's* reason, "for the tenancy is extinguished in the seignory :" and he cites *St. Paul v. Dudley* (*a*), which, as I have before observed, does not affect the question of tenemental lands, relating, as it did, solely to copyholds; but I think I may add that Mr. *Preston* is not strictly accurate in saying that the consequence of an escheat is, that the tenancy is extinguished in the seignory. Such a position seems to assume the merger of a lesser estate in a larger, both estates subsisting and coming into the same hands; whereas an escheat (as I understand the word) is the consequence of the cessation of the tenancy. The tenancy is at an end, and cannot therefore be extinguished; it is the cessation, not the merger, of a charge upon the seignory. I cannot therefore consider this passage as any authority that tenemental lands, once severed from a manor, are re-annexed, and become again parcel of the manor, by a purchase by the lord.

Bro. Ab., *Comprise*, *pl. 19*, was also cited. The passage is this:—"It is said that, where a recovery is pleaded of a manor, of which "the land is parcel, if the other will contradict this, he shall say, "not parcel of the manor, and so not comprised; and there it is "said that, if a lease for life or gift in tail be made of parcel of "a manor, there, during this interest, the lands are not parcel of "the manor in possession, but the reversion is parcel of the manor; "and where a disseisin or feoffment on condition is made of a parcel "of a manor, this is not parcel until re-entry." I see nothing in this passage which relates to the present question. No doubt, if a particular estate be granted of lands parcel of a manor, such lands are re-annexed to the manor after the determination of the particular estate; and, in case of a disseisin and re-entry, the re-entry relates back to the disseisin.

(*a*) 15 Ves. 107.

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E. T. 1858. *Fleta*, lib., 6, c., ss. 18, 19, p. 372 (ed. 1647), was cited, to show
Exch. Cham. (as I understand the argument) that no substantial distinction exists
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DELACHEROIS between an escheat and a purchase, inasmuch as the lord coming in by escheat is there termed "*ultimus hæres*." *Fleta* says:—"Domus vero capitalis loco hæredis, habetur quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis etiam haberi poterit, cui, per modum donationis, fit reversio cujuscunque tenentis." The meaning of this plainly is, I apprehend, not that the lord by escheat takes, as heir or assignee, the estate which the ancestor or assignor had, but in substitution of the heir, just as in the case of a reversion, the possession is substituted for the reversion. In *Burgess v. Wheate* (a), the Master of the Rolls shows that the lord coming in by escheat was not strictly an heir or assignee, and that he is excluded from benefits to which an heir or assignee would be entitled: and, in p. 228, Lord Mansfield explains what is meant by "*ultimus hæres*", as applied to a lord who is in by escheat. He says:—"As soon as a liberty of alienation was allowed, without the lord's consent, this right (i. e., the right of reverter on failure of heirs of the tenant) changed its name; it became a sort of caducary succession; thence the lord was called *tanquam hæres*." It does not appear to me, therefore, that designating a lord coming in by escheat as "*ultimus hæres*" affords any proof that the falling in of an estate by escheat is at all analogous to, or substantially the same with, the acquisition of the same estate by an assignee as a purchaser.

In Mr. Preston's work on *Abstracts*, vol. 3, p. 30, it is true that the learned author thus expresses himself:—"Lands which become part of a manor by an escheat, or by purchase, after the publication of a will, will pass as part of the manor." For this position, however, no authority is cited. Mr. Preston is here discussing the doctrine of copyholds; and perhaps his observation is to be understood with reference to them. If so, it is perfectly correct; but this dictum alone is not sufficient to prove the rule to be the same with respect to tenemental lands.

Let us now see what is to be discovered, in the way of authority,

(a) 1 Eden, 208.

to the contrary. I have already adverted to the case in *Anderson*, where the Chief Justice says, that lands severed from a manor cannot be re-united by purchase. *Vin. Ab., Manor*, R 2, pl. 7, refers to *Moore*, p. 237 (*Brooke v. Smith*), where Shuttleworth says:—“If a tenant does offence, by which his land comes to the King by royal escheat, it seems the seigniory is clearly extinct; but he doubts of the purchase of the King.” In 12 *Mod.*, p. 138 (*Anon.*), Lord Holt says:—“If a tenancy escheats to the lord, it becomes part of “the manor; but, if the lord purchase part, it is only holden of the “manor, and not part of it; but the rents and services are part.” In consequence of the use of the word “part” here, it has been argued that the inference is, that if the lord should purchase the whole of the tenemental lands, they would become parcel of the manor. This, however, is a *non sequitur*. The meaning appears to be this—by escheat the tenancy becomes parcel; by the purchase of part, the services are not extinguished, but the land is still holden; but nothing is said as to the effect of a purchase of the whole. The effect of that might be the extinction of the services; but does it follow that, because the services are extinguished, that is, cannot be rendered by the lord to himself, therefore the lands are re-united to the manor, and again become parcel of it? That is the position which, as it appears to me, the argument for the defendant, and the cases cited by him, fail to establish.

In *Holmes v. Hanby* (a), the case was, that the lord of a manor devised the manor in tail to J. S., remainder over; “which J. S. “had twenty acres in fee, which were holden of the manor by suit of “Court; and he, being so seized of all, conveys the manor to A in “fee; and the *quære* was, whether the twenty acres passed as parcel “of the demesnes of the manor? and it was holden clearly that they “did not pass, especially here, because there is no union of estates, “inasmuch as they are not both in fee.” The report, however, goes on:—“But if both had been in fee, they would not have passed, “because, in order to pass as part of the demesnes, they ought to have “been so from time whereof, &c.; and there is the diversity between

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In the report of the same case, 2 *Kebl.*, p. 28, the decision is based solely on the distinction between "escheat" and "purchase." If this case be law, it appears to establish that the cases of escheat relied on by the defendant are no authority whatever that lands purchased by the lord of a manor, of which they were holden, became, by such purchase, again parcel of the manor, so as to pass by a grant or devise of the manor. It was argued that, as the non-existence of co-extensive estates is assigned by *Siderfin* as a reason for the decision, therefore it is to be inferred that, if the estates had been co-extensive, the decision would have been different. But that does not follow; and, if the report in *Keble* be correct, it was on the point of its having been a purchase that the judgment was rested.

A note to 6 *Nev. & Man.*, p. 499, was relied on by the defendant's Counsel. In that note, the nature of a manor is accurately stated; but it appears to me that the learned reporter's note makes against rather than in favour of the defendant. He says:—"Tene-
 "mental lands are only *quasi* parcel; they are potentially parcel, in
 "respect of the possibility of an escheat of the fee-simple, or a deter-
 "mination of the particular estate, in the case of a tenure for life or
 "in tail, upon which the tenemental lands will again become parcel
 "of the manor, as they were before the creation of the estate which
 "severed them from the demesnes." I understand this to mean that in those ways only can lands once severed be re-annexed—not a word about purchase.

The same inference, I think, is to be drawn from *Bro. Ab.*, Com-
 prize, *pl.* 27, which merely states what is indisputable, that a lease for life or in tail will cause a severance only during the particular estate.

Anderson, p. 257, and other authorities, were cited by Mr. *Law*, to prove that, so long as one tenant remained, a manor could not be extinct, though all the other demesne lands had been severed; and also that, by a feoffment of a manor with livery, the manor and its appurtenances would pass, without immediate attornment, and that the subsequent attornment would relate back to the feoffment,

so as to pass all *ab initio*. All this may be so; but it does not touch the matter before us. And in the very case in *Anderson* it is said:—"If one alien the demesne of a manor, and make livery, "and afterwards by another deed grant to him the services, this "does not make a manor, although the demesnes and services are in "the hands of one who is seised in fee of both; for the services "being absolutely severed from the demesnes, or, *e contra*, the "demesnes from the services, the manor is extinct; for, in this case, "the possibility of joining them together, and thus make a manor, "is altogether taken away."

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Mr. Law alleges that no distinction is taken in the books between "escheat" and "purchase." If the observation be confined to copy-hold lands, or some peculiar customary holdings, it may perhaps be correct; but I do not subscribe to the proposition that, with respect to tenemental lands, that is, freehold lands, no distinction is taken in the books. *Glanville*, *Britton* and *Bracton* were cited, to show that an escheat is a succession. But what does that prove? Does it show that the lord comes in in the same way as an heir or assignee? *1 Hale, P. C.*, p. 249, and other authorities, were cited, to prove that the lord takes by escheat, subject to the tenant's charges. Supposing that to be so (which is not certain), it would not show the lord to be assignee, any more than a surrender by the tenant (which would be subject to his incumbrances) would, for any other purpose, be considered an assignment, and not a merger, or falling in of the particular estate.

In *Lord Mountjoy's case (a)*, in answer to an argument that, if a manor had been let at £10, and afterwards a tenancy escheats, yet the manor might still be let at £10, as the ancient rent, the Court say:—"As to the case of escheat of a tenancy, it was agreed for "good law; for the act of the law or of God will not prejudice "any one; but if the lessor had purchased the tenancy, it would be "otherwise; for that which is purchased is *not parcel of the manor*, "because he acquires it by his own act."

I think it impossible, after this, to say that no distinction is taken in the books between the case of an escheat and that of a purchase.

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In 12 *Mod.*, p. 188 (*Anon.*), Lord Holt says :—"A tenancy escheated to the lord becomes part of the manor; but, if the lord purchase part, it is only holden of the manor, and not part of it; "but the rents and services are part." Here again "escheat" is distinguished from "purchase." A devise of a manor will pass all that the lord has in the manor, including all incidents, and, amongst others, a reversion, or a possibility of reverter, such as the possibility of an escheat, because such possibility is vested in the testator at the time of the devise; but, where he has no such vested interest, no more than an heir expectant, his subsequently acquired interest, originating in, and entirely arising out of, his own subsequent purchase, is altogether different from and additional to anything which he had when the will was made. In case of an escheat, no new estate is acquired; it is the old estate which the devisor had when he made his will, only becoming an estate in possession, instead of one in reversion or expectancy.

In *Jenkins' Cent.*, p. 232, already cited, the case is :—"A purchased a manor of B; before the purchase, B had purchased lands holden of the manor: those tenancies do not pass, not being parcel of the manor." This is directly in point.

In *Jones v. Roe* (a), it was held that a possibility, coupled with an interest, is devisable, but that a bare possibility is not. What is here devised but a possibility, if so much? Where is the interest which ought to accompany the possibility?

In *Regina v. Duchess of Buccleuch*, the sixth resolution is, "Lands once severed from a manor can never after become parcel of it in reality, though they may in reputation; as if lands, part of a manor, be aliened away absolutely, and re-purchased, and an unity of possession for a considerable time after."

A case has been supposed, of the lord becoming heir-at-law of the tenant. No such case appears to be alluded to in the books; but I should say that, even in that case, it is not to be taken for granted that the demesne lands thus coming to the devisor, after a devise of the manor, would pass by such previous devise: and so, if the tenant devise the tenancy to the testator, after the making of the

will, I should say that the estate so acquired was acquired subsequently to the devise, and would not pass by it.

Since the argument, I have found some authorities which appear to me to be inconsistent with the proposition contended for by the Counsel for the defendant. In *The Earl of Leicester's case*(a), King Edward 6th was seised in fee of the manor of Clyberie, of which a certain wood of 300 acres was parcel. He granted the wood in fee; afterwards the said wood came back to him, as an escheat for treason; afterwards Queen Mary granted the wood in fee; the grantee re-granted it to Queen Elizabeth, who granted to Lord Leicester the manor, and all woods now or heretofore known or reputed as part members or parcel of the same manor. The question was, whether by this grant the wood passed? and held that it did, as the word "heretofore" referred indefinitely back to the time when the wood was parcel. Now, if by the re-grant to Queen Elizabeth the wood became again part of the manor, no question could have arisen; for the grant of the manor alone could, *per se*, have passed the wood.

In *Lee v. Brown*(a), a similar question arose, viz., whether, by the grant of a manor, lands reputed parcel would pass? and held that they would, the jury having found that they were formerly parcel, and afterwards were again united in the possession of him who had the manor. In *Pollexfen*, p. 412, the argument of the Counsel against the judgment is given; from which it appears to have been taken for granted that once there was a severance the re-purchase could not be a re-annexation, and that the only question was as to the effect of the words "reputed to be parcel."

In *Lemon v. Blackwell*(c), it is laid down:—"If one grant away any part of the demesne in fee, they are severed from the manor, and can never be part of it again (6 Rep. 65), though it be but for an instant."

In *Rex v. Bishop of Rochester*(d), the same law is to be found, viz.—"An acre once disunited from a manor can never

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(a) 3 Dy. 362, a.

(b) 2 Mod. 69; S. C., 1 Free. 207.

(c) Skin. 192.

(d) 2 Mod. 2.

E. T. 1858. afterwards be parcel of that manor ; " for which *Lyford's case* (a) ^{*Exch. Chanc.*} is cited.

DELACHEROIS v. DELACHEROIS In *Lyford's case* (b), it is said :—" If a man makes a lease for life of a manor, excepting one acre, and afterwards grants the reversion of the manor to another in fee, the acre in possession shall not pass, but is severed from the manor for ever." And in the same case, p. 50 a :—" If a man makes a feoffment in fee of a manor, excepting the trees, and, afterwards, the feoffee buys the trees, they are again made parcel of the inheritance, though they were absolutely divided for a time ; but, in the same case, if an acre or a house had been excepted, and the feoffee afterwards purchases the acre or the house, none of them shall be parcel of it again."

Upon the whole, the defendant's case appears to me to be founded upon a principle which is not sanctioned by any authority, and upon a supposed analogy, which does not exist, viz., between the case of a purchase which is the act of the party, and that of an escheat, or the expiration of a particular estate. I am of opinion that it is nowhere established that tenemental lands, once severed from a manor, can be re-annexed, and again become parcel of that manor by being purchased by the lord. That proposition is indispensable to sustain the defendant's case, and has not been, in my judgment, established, particularly with reference to the law of devise. I am therefore of opinion that the judgment of the Court below was right, and ought to be affirmed.

RICHARDS, B.

It is sufficient for me to say that I fully concur in the clear and able judgment of my Brother GREENE, and am of opinion that the judgment of the Court of Common Pleas should be affirmed.

PERRIN, J.

I am of the same opinion.

CRAMPTON, J.

I also concur in the full and able judgment that has been pronounced by my Brother GREENE.

PIGOT, C. B.

I have not been able to overcome the difficulty which I have felt in coming to the conclusion at which the other Members of the Court have arrived. I shall state shortly in what that difficulty consists.

We are here dealing with a case which must (as admitted in the discussion before us) be treated as if the Statutes of *Quia Emptores* and *De Prerogativa Regis* had not been passed. The authorities cited in the lucid and able judgment of my Brother GREENE establish, beyond doubt, that, since those statutes, a conveyance, by the owner of a manor, of land which is part of it, causes a severance of the land from the manor, and that, when the land is once so severed from the manor, no subsequent acts of parties can re-unite them. The reason is plain. In every instance of that kind which has occurred since the Statute of *Quia Emptores*, the grant by the owner of the manor must have severed the land from the manor, because, since that statute (unless perhaps in the excepted case of licence mentioned in Serjeant Manning's note) (a), no services could have been reserved upon a grant made by the lord. The estate must of necessity have been granted to hold of the next superior lord of whom the manor was holden. There remained, connected with the manor, neither land nor service. So of a release of services by the lord to the tenant in fee of the freehold. But in the case now before us, as in cases in which there was a similar dealing, before the Statute of *Quia Emptores*, what occurred was not an alienation of the land, severing it from all connection with the manor. The grant of the land (of 1721), reserving services, retained by means of those services the lands in connection with the manor; and this the law allowed, because the Statute of *Quia Emptores*, or *De Prerogativa Regis*, did not apply.

The proposition which the authorities referred to on this point establish, namely, that since the statute, where it applies, such a grant would operate a severance, is in my judgment quite beside the proposition on which the plaintiff in error relies; namely, that resumption, or reverter, by acts of parties having competent estates

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Each. Chem.
escheat.

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Some of the cases which have been cited and discussed in the course of the argument appear to me to be perfectly irreconcileable with the view that a reverter by such resumption cannot take place. The case in *Ley's Reports*, p. 63 (*Montague's case*), was fully considered, and decided with great deliberation. From the nature of the case itself and the character of the reporter, I take it to be of very high authority. I shall not go into the details of it; but I do not find it possible to reconcile the judgment of the Court in that case with any other view than this: that, where lands are held in fee, as of a manor, by service to be rendered to the owner of the manor, as such, these lands are capable of being re-united to the manor by a purchase of the land from the owner in fee of the land, by the owner in fee of the manor: and the same appears to me to be the result of the cases in *Saville*, p. 21, and in *Moore*, p 729.

I do not think that the cases relied on to show that such a reunion cannot take place by such means are sufficient to overbear the weight of those authorities. With respect to *Anthony Lowe's case* (a), we cannot take a sentence in the remarkable argument of Lord Bacon, reported in his works, as an exposition of the law of the present case: and the case itself presents no features of analogy to the one now before us. The decision was founded upon the terms of the grant from the Crown, and did not turn upon any question of law, such as that which we are considering.

Lord Mountjoy's case (b) is undoubtedly entitled to the highest consideration. I quite concur in what has been said; that many axioms of our law are derived from resolutions of the Judges, recorded in the reports of Lord Coke, not pointedly expressed with reference to the particular subject before the Judges, but laying down general propositions by which they professed to be guided. But I cannot interpret the observation made in *Lord Mountjoy's case* by the Court, in answer to the argument relative to the acre of waste, as a general proposition of law. It appears to me that it

must be understood by reference to the particular state of facts then before the Court, and to the limited character of the estate of the lessor, with whose act they were dealing; viz., an estate tail, of which the tenant in tail had made a lease, *ultra vires*, of lands not formerly leased. A person having such an estate could not, by his purchase of the tenancy, have re-united it to the manor, in which he had himself only a partial interest.

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It appears to me to be a carrying of the proposition in *Lord Mountjoy's case* beyond its legitimate bounds, to press it to this extent: that it lays down as a general rule of law, that an estate in fee, granted prior to the Statute of *Quia Emptores*, of lands to be held by services, as of a manor in fee, cannot be re-united to the manor by purchase, by the owner in fee of the manor, from the owner in fee of the lands. The case in *Siderfin*, p. 284, and *2 Keble*, p. 28, is open to the same observation. I shall not advert in detail to the other passages cited from the books, in favour of the same view: *Temple v. Cooke & Wotton* (*a*); *Brunker v. Cooke* (*b*); *Anonymous* (*c*); *Anonymous* (*d*); *Queen v. Buccleugh* (*e*); *Finch*, p. 134; see p. 35; *Ass.*, p. 15; 7 *Hen.* 6, cc. 3, 4, 5; 2 *Inst.*, p. 64; 47 *Edw.* 3, c. 21; *Riharaves' case*. They have been fully commented on at the Bar.

None of them appears to me to controvert, by any authenticated decision, the principle involved in the decisions of the cases in *Ley*, in *Saville* and in *Moore*. That principle is, I think, sustained by strong feudal reasons. It was of great importance, with a view to the preservation of manors, and their Courts, that such a dominion as that of re-annexing to manors freehold lands held by service as of the manors should exist, prior to the Statute of *Quia Emptores*. Before that Act, estates of freehold of various kinds might have been granted by the lord of the manor.

It would have fettered the lord to an extent not quite consistent with the feudal relations existing between the lord and the occupier

(*a*) 2 *Dy.* 265; abstracted in *Jenk. Cent.* 235.

(*b*) 11 *Mod.* 129; *Holt's Rep.*, 253; 1 *Salk.* 238.

(*c*) 11 *Mod.* 53.

(*d*) 12 *Mod.* 138.

(*e*) 6 *Mod.* 150.

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of the soil, that his dominion should be abridged by a disability which should forbid him to resume lands, still connected with the manor by service,—when it was no longer convenient for his freeholder to hold them,—to re-annex them to the manor, and to grant them out again to new freeholders better able to render the necessary service.

It will be in entire consistency with the purposes for which manors were established, and with the feudal analogies presented to us in the course of the argument, to consider that, in the grant of land, to be held for a freehold estate, as of a manor, for service, there is an inherent incident that it shall be subject to reverter by resumption, as well as to reverter by escheat. If this be so, the lands in question must be taken to have passed by the will as parcel of the manor, and there ought, in such event, to be a *venire de novo*.

I state thus the result of my views of this case, with the diffidence which I ought to entertain in them, after the opinions which have been expressed by others. But I have not been able to divest myself of the impression which I formed upon the authorities and reasoning presented to us in the course of the argument; that these lands became again by the re-purchase part of the manor to which they belonged when the grant was made, and as of which they continued uninterruptedly from that time to be holden by service.

LEFRAY, C. J.

In this case I have listened, with all the attention that it so well deserved, to the very able and ample consideration which my Brother GREENE has given to this case; and I must say that my researches have not enabled me to add anything whatsoever either in the way of authority or of argument to that judgment, upon which I am perfectly willing to rest my decision in this case, with the addition of only one observation in reference to a distinction which has been since adverted to. The distinction to which I allude is this, that the transaction here, when the services were created, took place after the passing of the Statute of *Quia Emptores*; but I confess that circumstance appears to me to make this an *a fortiori* case; for it is beyond all doubt that no services

reserved since the passing of the Statute of *Quia Emptores* can create tenure in the sense in which tenure was created before that statute. E. T. 1858.
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The feudal services created before the Statute of *Quia Emptores* were the link which connected the tenancy of the land with the seignory of the manor, but that connecting link could never be created after the Statute of *Quia Emptores* became law. Since that statute, whatever tenancy could have arisen between grantor and grantee, if it was a feudal tenure, could have created a tenure only as between the lord paramount and the grantee; and therefore if the connecting link which constitutes a seignory, by uniting the manor and the tenemental lands, were wanting, by no possibility could the devise of the manor include these lands between which and the manor there could not possibly be a connecting link. In respect of the Statute of Wills, the seisin which the lord of the manor had of services was a perfectly distinct thing from the seisin in fee of the lands which he acquired subsequently to the making of his will.

The Statute of Wills puts it beyond a doubt as regards the seisin of the thing devised: the identity of the seisin must be precisely the same, at the time when the will takes effect, that it was at the time of the making of the will. If it be acquired by a subsequent transaction, it is subsequently acquired property.

The services here are services in fee, quite distinct from the seisin of the land; and there existed no connecting link between them in the way of feudal tenure, for such could not be created since the Statute of *Quia Emptores*.

These reasons are such as to make me adhere to the opinion I originally formed upon this case, and in which I concur with the majority of the Members of the Court.

The result is that the judgment of the Court below must be affirmed.

Judgment affirmed.

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Common Pleas.

AUSTIN v. TUITE.

(*Common Pleas.*)

April 15.

In an action for false imprisonment, the defendant pleaded that he was a Magistrate, and that he convicted and committed to prison the defendant Harriet, in his magisterial capacity, under circumstances which were set out, and which justified his conduct; and he also averred in the same plea, and without having obtained a rule for leave to plead "several matters," that the notice required by the 12 Vic., c. 16, s. 9 (the Act for the protection of Justices of the Peace), had never been served upon him.—*Held*, that this was a double and embarrassing plea. The action was brought, *inter alia*, for a false imprisonment. To the false imprisonment the defendant pleaded that, before and at the time mentioned in the summons and plaint, he was, and still is, a Magistrate of the county of Westmeath, and that the plaintiffs, during all that time, were commorant within the said county, and within the jurisdiction of defendant as such Justice of the Peace. It then stated, in detail, a complaint made against the plaintiff Harriet, and her attendance before him as a Magistrate, and went on to aver that this defendant did then and there convict the said Harriet of a certain offence, and did then and there order the said Harriet should find two sufficient sureties, each in the sum of £10, for her, the said Harriet, to be of good behaviour for the term of two calendar months then next ensuing, or, in default thereof, to be imprisoned in the gaol of Mullingar, being the county gaol of said county, for the space of two calendar months, unless the said Harriet should in the meantime find such sureties as aforesaid. The plea then stated that the said Harriet did not nor would find such

Where the 45th General Order gives the opposite party leave to mark judgment without motion, where the other party, without a rule for that purpose, pleads or replies "several matters," for the pleading of which a rule is required by the Procedure Act, the words "several matters" refer to several matters pleaded in several distinct pleas, but are not intended to include several matters introduced into one plea. The same words in the 57th section of the Procedure Act have the same meaning. In such a case the proper course is to apply to the Court to set aside the plea as embarrassing.

sureties, upon which the defendant made his warrant of commitment, under which she was imprisoned and kept in the custody of the gaoler for the term aforesaid, she not having found such sureties, and that she was at its expiration discharged and allowed to go at large; which are the same imprisonments and grievances in the introductory part of the plea and in said summons and plaint mentioned. And the defendant further averred that he had, as such Justice, reasonable and probable cause for the doing of all and each of the acts aforesaid so done by him, and that the same and each of them were and was done in the execution of his duty as such Justice, and without malice, and with respect to matters within his jurisdiction as such Justice, and that said conviction or order never were or was quashed upon appeal or otherwise, and that the said Harriet was actually guilty of the said offence of which she was convicted, and that she underwent no further or greater punishment than that assigned by law for said offence of which she was convicted. The plea concluded as follows:—"And this defendant avers that no notice in writing of this action was delivered to this defendant, or left for him at his usual place of abode by the plaintiffs or their attorney, with the cause of action, and the Court in which the same was intended to be brought, clearly and explicitly stated, and upon the back thereof indorsed the name and place of abode of the plaintiffs, and also the name and place of abode or of business of said attorney, as is required by the statute in that behalf made and provided."

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Macdonogh and *Vereker*, in support of the motion.

In this plea there are two several and distinct matters pleaded in one plea. If the Magistrate acted legally and *bona fide*, as he alleges, he need not do more than prove the truth of this assertion, and he must succeed in the action. But he cannot, consistently with any rules of pleading, go further, and add, "but whether I acted rightly or not I am indemnified, under the 12th *Vic.*, c. 16; because you omitted to serve me with the notice required by that statute." If he have these two distinct defences, he should make his election between them; or, if he desire to

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rely on both of them, he should go to the Court with a [proper affidavit of merits, as required by the 57th section of the Procedure Act, and get leave to rely on both. This plea is manifestly a union of two distinct defences, united for the purpose of avoiding the inconvenience of an application to the Court; or possibly to meet the inability on the part of the defendant to make an affidavit of merits. Assuming then that this plea is double, the next question arises, viz., how to deal with it? On this subject the 57th section of the Common Law Procedure Act and the 45th General Order are explicit. The Act gives the defendant, by leave of the Court, a right to plead "as many several matters" as he shall think necessary for his defence: and the General Order just referred to directs that if a defendant, without a rule for that purpose, plead or reply "several matters," for the pleading of which a rule is required by the Common Law Procedure Act, the opposite party may mark judgment without motion. Now in this case the defendant has pleaded "several matters" without leave, and the plaintiffs are accordingly entitled to mark judgment.

Battersby, contra.

The defence avers that the defendant, as a Justice of the Peace, acting in execution of his duty, is entitled to the protection of the statute 12 *Vic.*, c. 16. This is one connected proposition, though consisting of several facts. In *Grady v. Hunt (a)*, MONAHAN, C. J., says:—"Undoubtedly the plea of the general "issue is taken away as regards the form of it, but it may be "questioned whether the substance of the enactment in 12 *Vic.*, "c. 16, s. 1, may not still continue, as only section 10 is expressly "repealed by the Procedure Act."

Now that statute is in full force except as to the pleading of the general issue, and section 10, and the defendant has a right specially to plead all the facts which bring him within the protection of it. One of these is the service of notice, which the plaintiff must

prove before he can maintain any action, and there is no duplicity in coupling that with the fact of the defendant acting as a Justice, for the fact of his acting as such within his jurisdiction entitles him to the notice, and in order to plead the want of notice such character must be averred; and whether that be done by a general averment, or by specific detail of the circumstances in which he acted, cannot make any difference in the validity of the plea. The Court is bound to give him the benefit of the statute, as fully as if the general issue had been pleaded, except in the two matters before mentioned; and this can be most effectually done by embodying in one plea the provisions of the Act.

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Vereker was heard in reply.

MONAHAN, C. J.,

We are of opinion that this plea is embarrassing, and must accordingly be set aside. It has been urged at the Bar that the defence amounts to no more than a statement that the defendant acted as a Magistrate, and that he did not receive the proper notice required by the statute, previous to the commencement of the action. If the absence of such a notice were the only ground of defence, it could have been so pleaded in almost as many words, and there would not have been any necessity for the long statement of all the facts now upon the record; but it is clear that the plaintiff could not safely have gone to trial upon such a supposition.

If he had proved the service of the notice in the form required by the Act of Parliament, it would have been quite competent for the defendant (after the plaintiff's case had closed) to have abandoned that part of the plea, and to have relied upon the other facts stated in his defence, as a justification.

Again, if the plaintiff, proceeding upon the assumption that the defendant intended by his plea to justify the acts complained of, had disproved the justification, it would still have been quite competent for the defendant to have obtained a verdict by relying on the non-service of the notice. In either alternative the plaintiff

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would have been liable to surprise, not in consequence of error or omission on his part, but because he was embarrassed by the defendant's plea. It is not possible, on reading over the plea, to discover the defence put forward, assuming that the defendant was only to rely upon one defence. Does he say, "I acted legally?" or does he say, "I acted illegally, but I am protected?" does he justify, or does he rely on the protection of the statute? He should have relied upon one or other of those defences, but he has no right to mix up both in one defence, and to have the advantage of both. The plea can be divided into two distinct averments, either of which would be a complete answer to the action. It is therefore a double and an embarrassing plea, and it must be accordingly set aside. But the present application goes further than that; it not only seeks to set aside the plea,—which, as I have said, the plaintiff is entitled to do,—but the notice also seeks for leave to mark judgment under the 45th General Order; and the propriety of granting that portion of the application has been strongly pressed upon us. But we are of opinion that this case does not come within the provisions of the 45th General Order.

The words "several matters," mentioned in that Order, and in the 57th section of the Common Law Procedure Act, refer to several matters pleaded in several pleas, or, in other words, to several distinct pleas; but they were never intended to include several matters introduced into one plea. In such a case, the proper course is to apply to set aside the plea as embarrassing.

It is only where several pleas, for which a rule is required, are pleaded without leave, that the opposite party is entitled to mark judgment; and, as the plaintiffs have asked for more than they are entitled to, the costs of both the parties must be costs in the cause.

BALL, KEOGH, and CHRISTIAN, JJ., concurred.

Rule accordingly.

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Exchequer Chamber.*

STEWART v. ASTON.

(*Error from the Court of Exchequer.*)

April 28, 29.

EJECTMENT on the title, for 17 acres of the lands of Carnall, situate in the county of Antrim. Defence was taken by the defendant for the whole of the lands mentioned in the summons and plaint. The case was first tried before CRAMPTON, J., at the Spring Assizes of 1856, for the county of Antrim, when a verdict was found for the plaintiff. Objections were taken on the part of the defendant to the charge of the learned Judge; and upon argument of those objections, the Court of Exchequer set aside the verdict, and directed a new trial. The case then came on for trial before Ball, J., at the Summer Assizes for the county of Antrim, when the evidence for the plaintiff and defendant was as follows:—The common title of both plaintiff and defendant was admitted to be a lease for sixty-one years, executed by George Augustus Marquis of Donegal to James Aston, deceased, bearing date the 5th of March 1806; the part of the lands comprised in the lease, and which were the subject of the ejectment, having come into the possession of the defendant under the will of the said James Aston. The plaintiff then produced as a witness W. T. Waterson, the attorney for the defendant, and one of the attesting witnesses to a deed of the 31st day of January 1842, which was then produced, and which purported to be an indenture signed, sealed and delivered by the defendant to the plaintiff. The witness

A procured B to execute to him an assignment of a lease, by means of a false and fraudulent representation, that he A was executor and devisee of W., and in that capacity a creditor of B. B was in fact indebted to W. for part of the alleged consideration moneys.—

Held, that A might maintain ejectment, the fraudulent representations not being sufficient (at Law) to avoid the deed, and a Court of Law being incompetent to do perfect justice between the parties.

Alterations made in a deed, after execution by the grantee named in it, though

material, will not prevent the deed being received in evidence on his behalf to show the estate which passed by it, and which was not divested by the alterations.

* Coram LEFROY, C. J., MONAHAN, C. J., CRAMPTON, PERRIN, KEOCH and CHRISTIAN, JJ.

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the directions of the plaintiff, for whom his father then acted as attorney, and that he saw it executed by the parties, and attested by the other subscribing witness, who had since died. This deed bore date the 31st day of January 1842, and was made between Samuel Aston, of Carnall, of the one part, and William Stewart, of Ree-hill, of the other part. It recited the lease of the 5th day of March 1806, to James Aston, and the title of the defendant thereto; it recited the consideration for the conveyance, and then assigned the lands absolutely to William Stewart for the residue of the term. This deed was duly registered. The recital of the consideration, as next given, shows the state of the deed as it was originally framed, and as it was altered by the plaintiff.

On cross-examination, his attention was called to the following paragraph in the deed:—"And whereas the said Samuel Aston "being indebted to the said *James* Stewart, of Ree-hill afore-said, by bonds and promissory notes to a considerable amount; "and the said *James* Stewart, having *since died* *excepted them*, the said "William Stewart, party hereto, his executor and devisee, hath "agreed to accept an assignment of said farm in discharge of "said securities, which, with interest and costs, amount to the "sum of £264." He then swore that the word "William," as it occurs twice in italics in the first part of that recital, and also the words "excepted them," were not in the deed at the time of its delivery to the plaintiff, and that they were written on erasures. A promissory note made by defendant was then produced to witness, and he swore that the word "James," purporting to be the Christian-name of the attesting witness thereto, and the word "William," purporting to be the Christian-name of the payee of the note, were respectively written on erasures. The plaintiff was then examined, and swore that the £264, the alleged consideration for the deed, was made up of £100 due to his brother James in his lifetime, and £164 due to himself; and that the deed had not been altered by him, or with his knowledge or consent. On cross-examination, he said that the word "James" stood in the deed when executed in place of "William," where "William" had been writ-

ten on erasures. Counsel for the plaintiff then proposed to read in evidence the deed of the 31st day of January 1842, as the deed of the defendant, to which Counsel for the defendant objected. The learned Judge admitted the evidence, and the deed was read accordingly. To this ruling an exception was taken by the defendant's Counsel. An extract from the book of acts of the Court of Prerogative was then read on behalf of the plaintiff; whereby it appeared that, on the 6th day of June 1844, probate to the will of James Stewart, which had been granted to the said William Stewart, had been cancelled and revoked: with this evidence the plaintiff closed his case. The defendant was then examined in support of his case, and he deposed that, previous to the preparation of the deed, he had executed two bonds and a promissory note to James Stewart, deceased; that at the time of the execution of the note, the word "James" had been where "William" then was; that the plaintiff had produced the note to him altered, and insisted the money was payable to him; that he said nothing about the alteration of the note, as he believed himself in the plaintiff's power; that at the time the deed was prepared, the money was read out of the deed to be due to the late James, and that witness never owed William Stewart any money, and would not have executed the deed if he had known that he was not the executor and devisee of James Stewart.

On cross-examination, he said he gave the note for money and goods he had got from James Stewart, whom he never paid; and that when he executed the deed, he got the bonds, and afterwards the note. Defendant's Counsel then produced James Adamson, who deposed that he wrote James Stewart's will, at the request of the plaintiff, by which all the lands were bequeathed to the plaintiff; that he was doubtful as to the state of James' mind at that time; that he was examined at the trial of the ejectment brought against the plaintiff by William Stewart, jun., when the will was broken, and William Stewart, jun., recovered and obtained possession of the lands. Counsel for the defendant then gave in evidence the sentence of the Prerogative Court, in the cause of *Stewart v. Stewart*, bearing date the 6th day of June 1844, whereby, after reciting that

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E. T. 1858. the will of James Stewart, deceased, and the probate thereof, had
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been obtained by concealment of truth and suggestion of falsehood,
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ASTON. it was declared that the said will was null and void, and letters of
administration of the estate and effects of the said James Stewart
were granted to *Martha Auld*. The defendant also gave in evidence
an attested copy of the judgment in ejectment and *habeas* in the
cause of *Stewart v. Stewart*. Upon this evidence, his Lordship
left to the jury five issues, which, with the findings upon them, were
as follows:—

First; whether the deed of assignment was obtained by the
plaintiff from the defendant by fraud? The jury found it was.

Secondly; if so, was it by fraud on the defendant, or any and
what other person? The jury found it was by fraud on the de-
fendant and heirs-at-law.

Thirdly; if by fraud, by what particular fraud? The jury found
by fraud of the plaintiff, falsely representing himself as executor
and devisee of the late James Stewart:

Fourthly; were the alterations and erasures in the deed made
fraudulently by plaintiff, or at his instance? The jury found they
were.

Fifthly; were the alterations made after the execution of the
deed? The jury found they were. Counsel for the defendant then
called upon his Lordship to direct a verdict for the defendant; but
his Lordship refused so to direct the jury, and directed them to find
for the plaintiff generally. Counsel for the defendant excepted to
this ruling of the learned Judge. Upon these exceptions, the case
was argued in the Court of Exchequer, in Easter Term 1857, when
that Court (*RICHARDS, B., dissentiente*) overruled the exceptions,
and gave judgment for the plaintiff. On that judgment, a writ of
error was brought.

W. M'Mechan and *T. K. Lowry*, for the plaintiff in error.

The first question is, whether this deed, so found by the jury to
have been fraudulently altered by the plaintiff, can be read in evi-
dence on his behalf for any purpose whatsoever? Where a party

has altered a deed fraudulently, he can never rely on it as evidence for himself. *Powell v. Divett* (*a*) shows the principle. There a sale-note was altered at the instance of the seller, without the consent of the purchaser; and it was held that the plaintiff could not rely upon it for any purpose. There, there was a contract capable of being proved at the trial; but the only evidence was the altered note; and so here, the only evidence of title was the instrument fraudulently altered by the plaintiff. It is not necessary to contend, in this case, that the deed was vitiated by the alteration, without more, for the fraud has been found by the jury. *Powell v. Divett* was recognised and followed in *Davidson v. Cooper* (*b*). No doubt, if there be no evidence to the contrary, it will be presumed that the alterations were made before the execution of the deed: *Doe d. Tatum v. Catomore* (*c*); but here it is found by the jury that the alterations were made after execution. The deed having been once destroyed, the estate which passed by it, if any, was destroyed also. If a man be in by a deed of a thing which lies in livery, as land, there the cancellation of the deed will not divest the estate, which passed by the livery; for the deed is only evidence of the transfer. The same principle applies to conveyances by lease and release, and a fine and recovery; but, with respect to things which lie in grant, the law is different. In *Bolton v. Bishop of Carlisle* (*d*), a different opinion is expressed by Eyre, C. J.; but that *dictum* cannot be supported. By the 8 & 9 Vic., c. 106, all estates are made to lie in grant; and the destruction of the grant is the destruction of the estate: *Doe d. Beanland v. Hirst* (*e*); *Roe d. Berkeley v. Archbishop of York* (*f*). But this deed passed no estate. The instrument, as produced by William Stewart, recited that the debt was due to him, and that was false; the deed was read falsely to Samuel Aston, and the *suggestio falsi* and *suppressio veri*, which were the inducement for the execution, are sufficient to vitiate the instrument *in toto*: *Fernor's case* (*g*); *Thoroughgood's case* (*h*); *Evans*

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(*a*) 15 East, 29.

(*b*) 11 M. & W. 778.

(*c*) 16 Q. B. 745.

(*d*) 2 H. Bl. 260.

(*e*) 3 Stark., N. P., 61 n.

(*f*) 6 East, 86.

(*g*) 3 Rep. 77 b.

(*h*) 2 Rep. 9.

E. T. 1858. v. *Edmonds* (a); *Cankam v. Barry* (b). The defendant supposed *Erch. Cham.* the deed would operate in one way, but it really operated in another: *Doe d. Lloyd v. Bennett* (c); *Bright v. Enyon* (d); *Blackwood v. Gregg* (e). The defendant will rely on *Feret v. Hill* (f); but there the fraudulent representation was only collateral; the consideration for the deed was the rent and covenants. Here the representations were material, which, we admit, is necessary—*Mallalieu v. Hodgson* (g)—and were the very consideration for the deed. *Doe v. Fallows* (h) is in point. There the false representation was by a recital that a pecuniary consideration had passed from the mortgagee in the deed to the administratrix. If forms of law are made instruments of fraud, they should be held void, so far as they were means of effectuating the fraud. It may be said here that there was a consideration, because the defendant was discharged from his debt: *Allen v. Dundas* (i); but this is a release of the debt, which is not good, under circumstances like the present: *Anonymous* (k).

They also cited *Doe d. Willis v. Martin* (l); *Master v. Miller* (m); *Collins v. Blantern* (n); *Bates v. Groves* (o); *Whelpdale's case* (p); *Cock v. Coxwell* (q); *Hennan v. Dickinson* (r); *Burfield v. Moore* (s); *Swiney v. Barry* (t); *Davidson v. Cooper* (u); *Doe d. Lewis v. Bingham* (v).

T. O'Hagan and A. Crawford, contra.

It is not true that the jurisdiction of Courts of Law and Courts of Equity, with reference to fraud, is co-extensive. *Blackwood v. Gregg* (w) contains the true exposition of the law upon this subject.

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| (a) 13 C. B. 777. | (b) 15 C. B. 597. |
| (c) 8 C. & P. 124. | (d) 1 Burr. 390. |
| (e) Hayes, 277. | (f) 15 C. B. 207. |
| (g) 16 Q. B. 689. | (h) 2 Tyrwh. 460. |
| (i) 3 T. R. 125. | (k) 1 Comyn, 150. |
| (l) 4 T. R. 39. | (m) 4 T. R. 320. |
| (n) 2 Wils. 347. | (o) 2 Ves. jun. 287. |
| (p) 5 Rep. 119 a. | (q) 3 Cr., M. & R. 291. |
| (r) 5 Bing. 183. | (s) 3 Ell. & Bl. 683. |
| (t) 1 Jon. 109. | (u) 13 M. & W. 343. |
| (v) 4 B. & Ald. 672. | (w) Hayes, 277. |

There Smith, B., says:—" Whatever a party signed, sealed and delivered, aware of its import and contents, and, with such knowledge, intending to execute it, is his deed; and any fraud which may have produced, or contributed to produce, this effect, is beyond our jurisdiction." The mere misrepresentation of a matter of fact antecedent will not vitiate the deed; for a Court of Law has no authority to inquire into those circumstances: *Hovenden v. Tilly* (a); *Mason v. Ditchbourne* (b). *Feret v. Hill* (c) is in point, and does not conflict with *Canham v. Barry* (d) or *Evans v. Edmonds* (e); for, in the last two cases, the action was brought upon the covenant in the deed. *Doe d. Willis v. Martin* (f) was not decided upon the ground of fraud; and the facts of *Doe v. Fallows* (g) are quite distinguishable from those of the present. This case therefore does not come within the principle of *Thoroughgood's case* (h), which was truly said in argument, in *Blackwood v. Gregg*, to mark the utmost limits of legal jurisdiction. The alterations in the deed did not divest the estate which passed by it, and it was admissible in evidence, for the purpose of showing what estate passed: *Buller's N.P.*, p. 267; *Doe d. Beanland v. Hirst* (i).—[MONAHAN, C.J. That case in *Starkie* is important in this view, that, though the alteration was not considered there to be a fraudulent alteration, still it was considered to be an alteration that vitiated the deed; and, as it was not an alteration that divested the estate, it was received in evidence for the purpose of showing what estate passed by it.]—The law is stated in the same manner in a note to *Pigot's case* (k), citing *Littleham v. St. Leonards* (l). *Powell v. Divett* (m) is distinguishable; for it was an action upon the altered instrument. Samuel Aston here got everything which he could have got if William Stewart had been a rightful executor: *Allen v. Dundas* (n). There was no

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| (a) 5 Ir. Law Rep. 462. | (b) 1 Moo. & Rob. 460. |
| (c) 15 C. B. 207. | (d) Ibid, 597. |
| (e) 13 C. B. 777. | (f) 4 T. R. 39. |
| (g) 2 Tyrwh. 460. | (h) 2 Rep. 9. |
| (i) 3 Stark., N. P., 61. | (k) 11 Rep. 27 a. |
| (l) K. B., M.S.S. | (m) 15 East, 29. |

(n) 3 T. R. 125.

E. T. 1858. release in the deed; it was merely an acknowledgment under seal
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for the money. William Stewart having acted as executor *de son tort*, his acts were good, and he was subject to all the liabilities, but entitled to none of the privileges of an ordinary executor: *Carmichael v. Carmichael* (a); *Sharland v. Mildon* (b); *Barker v. Talcot* (c); 2 Wms. Exors., p. 1188. If the defendant went into a Court of Equity, to get rid of this deed on the ground of fraud, he would not get relief, except on the terms of putting the plaintiff in the same position. That is a rule of Law also, as appears from the plea in *Canham v. Barry* (d); *Deposit and General Life Assurance Company v. Ayscough* (e). No offer of that kind has been made here; which shows what injustice might be done by a Court of Law setting aside this deed, under a colour of doing justice.

They also cited *The Earl of Falmouth v. Roberts* (f); *West v. Steward* (g); *Agricultural Cattle Insurance Company v. Fitzgerald* (h).

W. M'Mechan replied.

LEFROY, C. J.

With regard to the merits and justice of this case, it stands thus:—The defendant, who received a certain consideration for the conveyance of the lands for which the ejectment has been brought, insists that he shall hold both the lands and the consideration. If he is entitled in point of strict law to do so, we must allow him the benefit of the law; but, if the law does not so entitle him, it will be a very happy thing to find that the principles of law coincide with the principles of common sense and justice. Does the law so entitle him? These are two questions upon this record, according to which we are to decide the law; the first is as to the effect of the alterations in this deed to destroy and defeat its original validity; and the next question is, whether the deed, though it may not be destroyed by anything done to it in the way

(a) 2 Phil. 101.

(b) 5 Hare, 469.

(c) 1 Ver. 474.

(d) 15 C. B. 597.

(e) 6 Ell. & Bl. 761.

(f) 9 M. & W. 469.

(g) 14 M. & W. 47.

(h) 16 Q. B. 432.

of alteration, is destroyed by some inherent defect, amounting, when taken in connection with the evidence, to such a fraud as that a Court of Law has jurisdiction to decide it to be a nullity upon that ground? The first question, as I have said, relates to the effect of the alterations in the deed. I need not refer further to their nature than to say that they do not at all apply to that portion of the deed containing the parcels of the lands, in which case, as Counsel suggested in argument, a question might have arisen of a different kind. With those parts of the deed we have nothing to do; because if the alterations were such as to make it impossible to say that the lands in question passed at all, it would be a strong measure to hold that this deed could have any operation whatever. Alterations, however, do appear on the face of the deed, in other parts of it; but, as I have said, they are not alterations that raise the least question of doubt or difficulty as to its having passed by assignment, and purporting to have passed by assignment to the plaintiff the lands which are the subject-matter of this ejectment. That was the operation of the deed. The assignment, therefore, at the time the deed was executed, was free from any objection of this sort, which could be relied upon; for there can be no question that, at the time the deed was originally executed, there was nothing upon it in the way of alterations to raise any ambiguity. That raises the question whether the alterations were made before or after the execution of the deed: and, beyond all doubt, the alterations were made after that time; and therefore, at the time the deed was executed, it was a perfect deed to all appearance, and, if it operated at all, it operated to pass by assignment the term for years in those lands, which was then vested in the defendant. But as alterations have been subsequently made, and as it is admitted that there are alterations in it now, more or less material (we may take them to be material, except that, as I said before, they do not raise any question as to the lands which passed), and as it has been found by the jury that these alterations were made by the plaintiff, and fraudulently made, it is said that those alterations will have the effect of divesting the title which passed when the deed was executed, and when it was in a perfect state. Now I take it

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E. T. 1858. that the authorities cited put it beyond all doubt that no alterations,
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Originally, when lands passed by livery of seisin, a distinction of this kind was taken; though the charter of feoffment, stating the uses to attend the estate in future, was altered subsequently to its execution, the alteration of that deed never divested the estate once passed, or destroyed the seisin. When the modes of passing estates were varied, and when, instead of being passed by livery of seisin, they were passed by the efficacy of a deed, whether operating under the Statute of Uses, or operating by way of grant, the principle, which originally was confined to charters of feoffment, was transferred to instruments operating by way of lease and release, or by grant. That this is so the authorities which have been referred to plainly show. The case which occurs to my memory on the subject is *Bolton v. The Bishop of Carlisle* (a); and the passage in *Buller's Nisi Prius*, and all subsequent cases, recognise the same principle. With respect, therefore, to the ground on which we are called upon to defeat this deed, on the assumption of those alterations having divested the estate, we are of opinion that there is nothing to support that argument. The next ground is, that we ought to hold the deed void for an inherent defect; that

(a) 2 H. Bl. 260.

it is a deed impeachable for fraud, for a suggestion of falsehood, and a suppression of truth, a deed in fact to be avoided in a Court of Law for a misrepresentation in respect of some matters stated in it. It would be a curious thing if a Court of Law were to avoid this deed, whereby the parties would be placed in an entirely different situation, with respect to what was just and equitable between them, from what they would be if the deed were avoided in a Court of Equity. A Court of Law would thus avoid a deed for fraud, and, by avoiding it, itself commit a fraud on one of the parties ; for it would leave the lands and the consideration for the lands in the hands of one of the parties. This case is directly within the principle of what is laid down by Burton, J., in *Hovenden v. Tilly*, that the Court will not set aside a deed on the ground of fraud, when it is incompetent to do justice between the parties, but will leave them to the only tribunal which can do justice between both, and will not, while professing to do justice on the ground of fraud, itself be accessory to a fraud. It is not necessary to go further into the case. One or two doubtful cases were referred to, but certainly very distinguishable from the present upon the point I have referred to, viz., the impossibility to do justice between the parties. There may be some simple cases of fraud, in which the Court could do justice between both parties by avoiding the instrument altogether ; it may be so. I do not think it necessary to consider these cases further, the more so because unquestionably if they go to establish the proposition that a Court of Law can set aside a deed in every case in which a Court of Equity can do so, they announce a proposition opposed to every principle down to themselves, and go far to destroy acknowledged land-marks of property.

I have thus gone through the case, I fear rather imperfectly, but we are desirous not to delay the decision, and we are all of opinion that the judgment of the Court of Exchequer should be affirmed.

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R O W E v. F A R E N.

(Queen's Bench.)

April 16.

In an action for breach of contract.—Count: and also for that, in consideration that the plaintiff would buy of the defendant 200 barrels of flax-seed, at fifty shillings per barrel, *the defendant promised the plaintiff to deliver to him the same flax-seed, and that the same should be extra clean seed, and new Riga, of the growth of 1856; and the plaintiff afterwards, and on or about the 2nd of February 1857, bought of the defendant the said flax-seed at the price aforesaid, and paid him for same; and it thereupon and thereby became and was the duty of the defendant to deliver to the plaintiff extra clean new Riga flax-seed, of the growth of 1856, and which should be good, sound and merchantable.*—Breach: that the flax-seed delivered to the plaintiff was bad, dirty and unsound, and unmerchantable; in consequence whereof, the said seed, having been sown, missed and failed in great part, and only partially produced a crop, which crop was weak, poor and unprofitable; and by reason of the premises, the said seed, at the time of the delivery thereof, instead of being worth fifty shillings per barrel, was not worth more than ten shillings per barrel; whereby, &c.

Held, upon demurrer, that the contract being express in its terms, no warranty could be implied in it that the flax-seed should be good, sound and merchantable.

Demurrer.—First, that it does not appear from the said count that it was the duty of the defendant to deliver good, sound and merchantable seed to the plaintiff: or, secondly, that there was any contract, expressed or implied, that the flax-seed, in the said count referred to, should be good, sound and merchantable. Thirdly, that it appears from the said count, that the defendant contracted with the plaintiff that the said flax-seed should be extra clean seed, new Riga, of the growth of 1856, and that therefore no warranty or contract can be implied that the seed was good, sound and merchantable. Fourthly, that the plaintiff and defendant entered into

a special agreement with respect to the quantity and description of the said flax-seed.

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W. Johns, in support of the demurrer.

The plaintiff declares upon a contract to deliver 200 barrels of flax-seed, "extra clean seed, new Riga, of the growth of 1856;" but to this express warranty he seeks to add an implied warranty, that the seed should be good, sound and merchantable. An express warranty cannot be so extended by implication : *Parkinson v. Lee* (*a*) ; *Dickson v. Zizinia* (*b*) ; *Owens v. Dunbar* (*c*). The cases of implied warranty in the sale of goods manufactured for a particular purpose do not apply to this case, which is not that of a manufactured article.

D. Lynch and *B. Stephens*, contra.

It is conceded that an express warranty cannot be enlarged by anything contrary to its terms. The distinction contended for is that, in sale by sample, the maxim "*caveat emptor*" applies, and nothing further is required than that the goods should be equal to the sample : but in sales not by sample, and where the express warranty extends only to the class, and not to the quality of the goods (which is the present case), the general implied warranty that the goods should be of merchantable quality is not excluded : *Gardiner v. Gray* (*d*).—[CRAMPTON, J. Suppose the defendant had taken issue on this count, and had proved that the flax-seed corresponded with the express terms of the contract, could you go on to show that, although the plaintiff had performed the contract, yet the seed was not merchantable ?]—That is the question to be decided ; if the seed was rotten and utterly worthless, would it be an answer to say that it corresponded to the express terms of the contract ? In *Hutton v. Warren* (*e*), Parke, B., says :—" It has long been settled that, in commercial transactions, extrinsic evidence

(*a*) 2 East, 314.

(*b*) 10 C. B., 602. ; S. C., 15 Jur. 359; 20 L. J., C. P., 73.

(*c*) 12 Ir. Law Rep. 304. (*d*) 4 Camp. 144.

(*e*) 1 M. & W. 466, 475.

- E. T. 1858. "of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent"—[LEFROY, C. J. What then becomes of the rule "*expressum facit cessare tacitum?*" Where a party measures his liability by express contract, it cannot be enlarged by implication.]—The express contract refers only to the class of the goods.—[CRAMPTON, J. Suppose a horse is warranted to be only five years old, and trained to single and double harness, but it turns out that the horse is unsound, could an action be maintained for the unsoundness?]—Horses are commodities subject to peculiar rules. We do not seek to enlarge the warranty, because it applies only to a particular class of the commodity, namely, that the seed should be "*extra clean*," which indicates a class of flax-seed well known in trade, but is wholly silent as to quality. This warranty is one which the law implies, and it would not be excluded even by a written warranty. Chief Justice Tindal, in *Shepherd v. Pybus* (a), says:—"We think the distinction to be taken is, that where the warranty is one which the law implies, it is clearly admissible, notwithstanding there be a written contract."—[LEFROY, C. J. If the contract were for flax-seed fit for growth, that would raise the liability which you seek to impart to this contract; but there are no such words here, and you cannot import a new term into the contract. There is no averment in the plaint that the contract was founded upon any *collation* at the time when the contract was made, warranting that the seed should be good, sound and merchantable.]—*Shepherd v. Pybus* was decided upon the authority of the rule laid down in *Chanter v. Hopkins* (b), namely, that the article sold shall be fit for the purpose for which it was intended by the purchaser; and the more recent cases, *Dickson v. Zizinia* (c), and *Longmeid v. Holliday* (d), also establish the same principle.—[LEFROY, C. J. Suppose when the defendant sold this seed, the cargo was sound at Riga; but by a fatality on the voyage, such as by heating or the like, it became unsound, could you imply a warranty that it should be

(a) 3 M. & G. 868, 878.

(b) 4 M. & W. 399.

(c) *Supra*.

(d) 6 Exch. 761; S. C., 20 L. J., Exch., 430.

sound on delivery?]—No, that would be a sale of a specific cargo at a specific time and place, and the contract would therefore apply to the cargo, as it was at that time and place. The present case is not a contract for specific goods.—[CRAMPTON, J. Can we decide for you without overruling *Owens v. Dunbar*?]—In that case the distinction which we contend for was not taken, because there a specific cargo was sold, and therefore no warranty could be implied.—[LEFRAY, C. J. You must show that, where a particular warranty is given, an additional warranty can be implied.—O'BRIEN, J. The plaint ought to have averred a contract to deliver good, sound and merchantable seed; but instead of that, it avers that by a contract to deliver seed, there is raised a contract to deliver good, sound and merchantable seed: that is an averment which the defendant cannot traverse, because it would be traversing matter of law.]

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They also cited *Smith's Mercantile Law*, 5th edition, p. 489.

Joy, in reply.

There is no such distinction as is contended for on the other side, between the sale of a mercantile article by sample and without sample; the real distinction is between an article which a person undertakes to manufacture and that which he merely sells without manufacturing it: *Bluett v. Osborne* (a); *Addison on Cont.*, 4th ed., p. 230. That distinction, however, has no application to the present case.

Lefroy, C. J.

We must allow this demurrer. We have already stated our reasons during the course of the argument.

Demurrer allowed.

(a) 1 Stark. 384.

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Queen's Bench

THE QUEEN, at the Prosecution of KYRAN HENNESSY,

v.

THE JUSTICES OF THE PEACE OF THE KING'S
 COUNTY.*

April 24.

When Magistrates exercise a discretion vested in them by Act of Parliament, the Court of Queen's Bench in the absence of any allegation of corruption, has no jurisdiction to review or control such discretion; and, therefore, the Court refused to direct Magistrates to grant a certificate of character to a party, to enable him to obtain an excise license, pursuant to the 17 & 18 Vic., c. 89, s. 11, the Magistrates having considered the application, and refused it.

A CONDITIONAL ORDER was obtained on the 26th of January 1858, calling upon certain Justices of the Peace for the King's County, therein named, to show cause why they should not grant to the said Kyran Hennessy a certificate, in accordance with the 17 & 18 Vic., c. 89, entitling the said Kyran Hennessy to apply for and obtain a renewal of an excise license to sell spirits, porter, &c., at his house at Bannagher, where he had been duly licensed to sell the same for the year immediately preceding that application. It appeared, from the affidavits in the case, that, on the 12th of October 1857, Hennessy applied to the Magistrates, at the Petty Sessions at Bannagher, for a certificate, in order to obtain a renewal of his license to sell beer, porter, spirits, &c., in the town of Bannagher, pursuant to the 17 & 18 Vic., c. 89, s. 11, which certificate was refused, on the grounds that he had been convicted of selling spirits without a license, previous to his then application; and also because a threatening notice had been addressed to a member of the Bench of Magistrates, warning him not to interfere in preventing Hennessy from obtaining such certificate. From this order of the Magistrates in Petty Sessions Hennessy appealed, under the 18 & 19 Vic., c. 62, to the next Quarter Sessions, when, the matter having been heard, the order of the Petty Sessions Court was affirmed.

Macdonogh (with him *D. Lynch* and *W. A. Exham*) now showed cause.

The 17 & 18 Vic., c. 89, prescribes the mode in which the party

* PERRIN, J., *absente*.

is to obtain the certificate, which entitles him to a renewal of his license. If the Magistrates refuse to grant the certificate, the 18 & 19 Vic., c. 62, gives the party who feels himself aggrieved by such refusal an appeal to the Quarter Sessions. Hennessy has appealed to the Quarter Sessions, and that Court has affirmed the order of the Magistrates. If a further appeal lie to the Court of Queen's Bench, then what necessity was there for giving an appeal to the Quarter Sessions?—[LEFROY, C. J. Have not the Magistrates exercised their discretion? If they act corruptly, the party aggrieved may apply for a criminal information against them.]—Yes; and that is the criterion adopted by Lord Ellenborough in *Rex v. The Justices of Kent* (a).—[He was then stopped by the Court.]

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The Solicitor-General (with him *W. J. Sidney*).

Although the Magistrates have acted, yet they have done so upon mistaken grounds. By the 12 Vic., c. 16, s. 5 (Justices Protection Act), the Court is empowered to direct the Magistrates as to what is their duty in certain cases.—[LEFROY, C. J. That section only applies where the Magistrates refuse to act.]—True; but as they have, in this instance, unquestionably acted under a mistake, the applicant only asks that this Court would pronounce an opinion which would serve as a guide to the Magistrates in such cases for the future.—[LEFROY, C. J. An appeal is given to the Quarter Sessions from the decision of the Magistrates; you have appealed, that appeal has been decided against you; how then can we go behind that decision?]—By the 18 & 19 Vic., c. 62, on an appeal against an order of refusal, the grounds upon which the Magistrates refused to grant the certificate must be set out; and it is as to the legality of these grounds that we ask for the decision and direction of the Court.—[O'BRIEN, J. Does not the Act of Parliament leave it in the discretion of the Magistrates to form an opinion as to the character of the person seeking the certificate?—They have exercised that discretion; and I find, upon referring to Mr. Levinge's book (b), in the note to section 5 of 12 Vic., c. 16,

(a) 14 East, 395.

(b) *Lev. Just. Man.*, 2nd ed., p. 7.

E. T. 1858. that he cites a case of *Clee v. Osborne* (*a*), which decides this very point, that when the Magistrates have not refused to act, but have done what they believed to be their duty, this Court will not interfere.—[CRAMPTON, J. I do not think we have any jurisdiction at all given us by the statute, except in cases where the Magistrates refuse to act officially.]—They also cited *The Queen, at the prosecution of F. Durham, v. The Guardians of the Poor of the North Dublin Union* (*b*).

Cause shown allowed, with costs.

(*a*) 21 L. J., M. C., 112.

(*b*) 2 Ir. Jur., N. S., 309.

FREEMAN v. KELLETT.*

April 24.

Where the original writ of summons and plaint, and the copy served, are, after sealing, altered without the authority of the Court, and the defendant, being aware of the alteration, goes to trial thereon, although under protest, and a verdict is found against him, the Court will not, after the trial, set aside the proceedings. Where a party intends to insist on the invalidity of the proceedings, by reason of such alteration, his proper course is to retire from any further proceeding in the cause.

MOTION to set aside the summons and plaint, and all subsequent proceedings in the action, on the ground that the original writ of summons and plaint, since the issuing and sealing thereof, and as well as the copy served on the defendant, had been altered without the leave of the Court, by the substitution of the words, "thirty-five pounds," instead of "fifty pounds," as the claim for damages in the summons and plaint. It appeared by the affidavit of the defendant's attorney, that, upon the 7th of December 1857, a writ of summons and plaint issued out of this Court, and, upon the 11th of December following, a copy of the same was served upon the defendant, which purported to demand the sum of £35, commission fees on a sum of £700, payable by the defendant to the plaintiff, in respect of the plaintiff's sale to the defendant of certain lands. That a defence was filed on the 4th of January 1858, and notice of trial served on

The alteration of a writ, after it has been sealed, without the authority of the Court, is wholly inexcusable, and the Court will visit such delinquency with the utmost severity.

* *Coram LEFROY, C. J., CRAMPTON and PERRIN, JJ.*

the 21st of January 1858 ; that, on the 4th of February 1858, the defendant's attorney, for the first time, discovered that the words "thirty-five pounds" were written on an erasure in the copy writ which had been served, and thereupon made inquiry in the Seal office, when, upon examination of the seal-book, it appeared that the original writ, at the time of the sealing, was brought for the sum of £50, and that the docket lodged by the plaintiff's attorney at the time of the issuing of the writ was for the sum of £50. That, upon examination of the original writ upon the file, the sum of £35 appeared to have been written upon an erasure in the several places where it occurred. That, on the 4th of February 1858, when the case was in the list for hearing, the defendant's attorney served notice on the plaintiff's attorney, acquainting him with the fact of the alteration in the summons and plaint, and cautioning him against taking any further proceedings in the cause, and informing him that he would attend the trial under protest. The action was tried on the 11th of February 1858. Previously, however, to the commencement of the trial, the defendant's Counsel called the attention of the Court to the alteration, and stated that he appeared under protest against the proceedings already had in the cause. The trial proceeded, and a verdict was found for the plaintiff.

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R. Douse (with him *R. Armstrong*), in support of the motion.

This alteration, without the leave of the Court, made the writ a nullity, independently of the question of waiver altogether.—
 [LEFROY, C. J. You appeared, and took your chance of the trial, and put the other party to all the expense of a trial, and now you come to disturb all these proceedings when there is a verdict against you.]—Yes ; I admit I must go that length. This is something more than a mere irregularity : *M'Keogh v. Hurst* (a). By section 8 of the Common Law Procedure Act 1853, every action is to be commenced by a writ of summons and plaint, to be authenticated by the seal of the Court, and a seal-book is to be kept ; the sealing is the *terminus a quo*. In this case, no writ has been sealed ; there

(a) 3 Ir. Jur., N. S., 92.

E. T. 1858. is no such writ as the present for £35, sealed with the seal of the *Queen's Bench*
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KELLETT. Court. By the 40th General Order 1854, no amendment of any pleading can be made, except by order of the Court. The writ must be considered as issuing when it is re-sealed: *Coleridge*, J., in *Knight v. Warren* (*a*); and from the time of re-sealing it becomes a new writ: *Ashburton v. Sykes* (*b*). There is a difference between an irregularity and a nullity; the former may be waived by the subsequent acts of the opposite party; the latter cannot: *Fer. Prac.*, p. 1038; *Temple v. Hamilton* (*c*); *Chit. Arch. Prac.*, p. 1375, 9th ed. *Siggers v. Sansom* (*d*) was the substitution of the name of one county for that of another. In *Taylor v. Phillips* (*e*), the service of the process was on Sunday; and in both cases the proceedings were set aside. In *Cooper v. Kerby* (*f*), the Court considered the alteration more than a mere irregularity—
 [LEFROY, C. J. There was no appearance in *Cooper v. Kerby*.]—Yes, there was the parliamentary appearance.—[CRAMPTON, J. But there, the parliamentary appearance was a nullity, not having been founded on the statute.]—These proceedings are defective *ab initio*, and therefore no question of waiver can arise; if the waiver is material, there has been no waiver; for we distinctly apprise the plaintiff that we intend relying on this objection: *Chit. Arch. Prac.*, p. 1378, 9th ed.

The *Solicitor-General* (with him *O'Driscoll*), contra.

In all these cases, two circumstances must be taken into consideration; first, is there any fraud in the matter? secondly, is an injury done to the opposite party by the alteration? Here no injury could be done, as it is perfectly immaterial whether £50 or £35 was in the writ; as, had it been £50, the party could have paid the £35 into Court, and defended the balance. The defendant, by going to trial, has waived the irregularity here: 1 *Chit. Arch. Prac.*, p. 190, 9th ed., and the judgment of Lord Brougham, in *Taylor v. Clem-*

(*a*) 7 Dowl. Pr. Cas. 663.

(*b*) 1 Dowl. & L. 133.

(*c*) S. & B. 271.

(*d*) 2 Dowl. Pr. Cas. 745.

(*e*) 3 East, 155.

(*f*) 5 Ir. Law Rep. 254.

son (a).—[*LEFROY, C. J.* These cases are all upon the question of waiver; but we want an authority which shows that where a party alters a writ, after the seal of the Court has been affixed to it, the Court will allow such a proceeding to stand.]—In *Farwig v. Cockerton (b)*, the objection was taken before the cause was called on, and before the jury was sworn. When a party comes in to set aside proceedings for irregularity, he must do so at the earliest moment. Here, the defendant had notice of the irregularity on the 4th of February, and yet he goes to trial, and takes his chance; and, when the verdict is against him, he then comes here to set aside the whole proceedings—a course of conduct which this Court will not sanction. In *Cooper v. Kerby (c)*, the alteration was a most material one, and the Court had no jurisdiction. When a writ is re-sealed within the six months prescribed by the statute, it bears date as of the original sealing; but not, if it be not sealed within the six months: *Black v. Green (d)*. In this case there was no hurry, no snatching of judgment; and, if necessary, to prevent injustice being done, the Court can order the writ to be sealed *nunc pro tunc*: *Ashburton v. Sykes (e)*.

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R. Armstrong replied.

This is not such an irregularity as can be waived by the defendant's appearance at the trial. The doctrine of waiver is, that it is a step by the party who is aware of the misprision, showing an intention not to take any notice of it. Here, on the contrary, there is no silence, but a distinct notice given of the objection, and that the defendant would attend the trial under protest. What is it that gives the Court jurisdiction? It is the seal of the Court. The settled law is, that if there be the least alteration in the writ, without the leave of the Court, the writ is a nullity. Can it be said that, if a verdict pass under protest, that the party cannot come in, and try to set aside the proceedings? It cannot be said

(a) 11 Cl. & Fin. 610, 643. (b) 6 Dowl. Pr. Cas. 337.

(c) *Supra.*

(d) 15 C. B. 262; S. C., *Anon.*, 3 Com. Law Rep. 38; 18 Jur. 1017;
24 L. J., C. P., 1.

(e) 1 D. & L. 133.

E. T. 1858. that the defendant is not prejudiced. There is no case in which
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LEFROY, C. J.

The motion before the Court in this case is, to set aside proceedings on which a trial has taken place, and a verdict been obtained, upon which the plaintiff would be entitled to enter up judgment; and at this stage of the proceedings the present motion is made to set aside all that has taken place. I may observe in the outset, that this is not a motion made for the purpose of vindicating the authority of the Court, and punishing the delinquency of any party who may appear to the Court to have intermeddled with its records.

The facts which appear before us, for the purposes of this motion, are the following:—The plaintiff's attorney gave correct instructions for the issuing of a writ against the defendant, “on foot of a claim “for £35, being the amount of the plaintiff's commission fees, “at £5 per cent. upon the sum of £700;” and thus the nature of the transaction, and the materials for what I may call self-correction exist, as far as we can see, upon the face of the proceedings. It appears that the writ, as originally sealed, was for £50; and I must take it for granted that the indorsement thereon was according to the terms of the body of the writ, namely, that although in the body of the writ the amount claimed was £50, yet that the indorsement was for commission fees at £5 per cent. on £700, which would only amount to £35. The original writ, and the copy at the time of service, contained the words “thirty-five pounds,” written upon an erasure—instead of £50.

As I have before observed, we are not at all proceeding on the circumstances of this case, so as in the least degree to excuse, justify or extenuate any alteration which has been made in the

writ; nor is the case brought before us with a view to vindicate the authority of this Court, and to punish the delinquency of whomsoever he be who has presumed to make an alteration in the writ after it has been sealed; but we are called upon to set aside proceedings which have occurred after defence taken to this writ, which bears upon the face of it the materials for self-correction. Well now, to return to the facts. The defence having been filed on the 4th of January 1858, notice of trial was served on the 21st of January, apprising the opposite party that the plaintiff was proceeding upon the writ as it was then served. It is said, that the defendant had no notice of the imperfection in this writ as served, or of the want of an original exactly squaring with it, until the 4th of February 1858; however, it is admitted that, on the 4th of February, the defendant's attorney made inquiry, and found that the writ, as originally sealed, claimed damages to the amount of £50; whereas, in the writ as served, the amount claimed was only £35. Well, being thus apprised of this alteration, on that same 4th of February, he served a notice upon the plaintiff's attorney, apprising him of the alteration having been made, and cautioning him against proceeding to trial. Notice of trial, however, had been served, and the case being listed for trial was called on. The defendant then repeats his objection; and under these circumstances the trial proceeds, and a verdict is had for the plaintiff; and the question is, are we to set aside the proceedings so had?

On the one hand it is said, it was the plaintiff's folly to proceed with the trial; on the other hand it is said, that the defendant, having made his objection, should have retired, and not have forced on his adversary to a trial; and this would have been in accordance with a most material observation of Parke, B., in *Farwig v. Cockerton* (*a*), where he says—"Your proper course would have been not to have appeared." The defendant, in this case, should accordingly have retired, and left his adversary to take his own course. Instead of that, both concur in going on with the trial, which is a most material fact to be considered,

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(*a*) 6 Dowl. Pr. Ca. 537.

E.T. 1858. when the question is, are we to set aside all these proceedings
Queen's Bench in which both parties take a share, and in which both concur?
FREEMAN I consider that to do so would be to commit an act of gross injustice;
v. KELLETT. it would, in effect, be enabling, nay, assisting and encouraging the defendant to inflict an injustice on his adversary, under the mask of vindicating the authority of the Court. We have it upon the affidavits, that neither the plaintiff nor his attorney were parties or privies to the making of this alteration; they have purged themselves of that charge; and although the alteration has been made by somebody or other, yet there is no one before the Court in whose person we can vindicate the authority of the Court. That, however, is not the object of the present motion; and I feel that to grant this application would be to commit a manifest act of injustice. We desire that our decision in this case should be perfectly well understood, that we consider that this is a matter not to be excused, justified or extenuated, under any circumstances, or by any statement of a party that he did not intend to commit a fraud. Nothing can justify a party's presuming to meddle with a writ after it has been sealed, without the authority of the Court. But we must refuse this motion.

CRAMPTON, J.

This is a very important case, upon which I wish to make a few observations. The present motion is made upon the ground that the learned Judge at the trial had no jurisdiction to try the case; that the trial amounted to a mis-trial, all the proceedings being, as it is contended, a nullity from beginning to end; and this, because the writ upon which the action proceeded was altered after it had been sealed by the officer of the Court; and being so altered, was not brought back to the officer for the purpose of being re-sealed. Now it is perfectly true, as appears from the facts before the Court, that although the writ was not altered by the attorney for the plaintiff, nor by his authority, yet, that an alteration was made by somebody in the employment of the plaintiff's attorney. My impression, however, with respect to this case, is, that the alteration was not made with any view to commit a fraud, but was merely a clumsy

attempt to correct an error made in filling up the summons and plaint. But assuming that to be so, the case now comes before us in a double aspect. The defendant has sustained no injury by this alteration; he has had his chance of a verdict, just as if the action had been founded upon the most effectual and formal writ in existence. Again, as I have already observed, my impression is, that no fraud was contemplated in making this alteration; but if this was not so, the party who has made the alteration, by doing so, has committed forgery, and may be indicted for that offence. But to say that the Court had no jurisdiction to try the case, because the writ had been altered, and, as it now appears, for an innocent purpose, is an argument which altogether fails; because we have it authoritatively established, if indeed we wanted authority for it, that even if no writ of any kind had at all issued, yet, if the defendant appear, and go on in the matter, and take his chance of a trial, and a verdict be found against him, the Court will not interfere on his behalf, to set aside the proceedings.

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But we are also called upon to vindicate the authority of the Court; and I feel sure that both branches of the Profession, as well as the public generally, will understand that it is gross mal-practice for any person to interfere with the records of the Court; and, I may add, that if the Court find any one interfering with the records of the Court, it will visit his delinquency with the utmost severity. I take this case, however, to be as if no writ at all had issued; and, upon the authorities, I feel quite satisfied that the proceedings which have already taken place should not be set aside upon a motion like the present.

It would be very hard indeed to visit upon the plaintiff the consequences of this improper proceeding, of which, however improper it may be, the defendant has no right to complain, no mischief having accrued to him by reason of it. But although the plaintiff's attorney is not the party who has made the alteration in the present instance, yet is he not answerable in a certain degree? Some one in his employment must have made the alteration; and for my own part, although the defendant has no merits to rely upon, except as *amicus Curiae* in giving the Court information of mal-practices, yet I consider

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we should mark our sense of such conduct by something more than by refusing this motion; and I therefore think that, while we do not cast the least imputation upon the plaintiff's attorney, he should pay the costs of this motion out of his own pocket, without charging them to his client.

PERRIN, J.

I have watched this case very closely. Here is an application to set aside all these proceedings, for something more than an irregularity or delinquency. As to the irregularity, the defendant cannot succeed, on the present motion, at this stage of the proceedings; as to the delinquency, he has not satisfied me who is the delinquent party, but certainly the plaintiff's attorney is not that party, nor do I cast the slightest imputation upon him. I therefore concur in the ruling pronounced by my LORD CHIEF JUSTICE; but I cannot accede to the position that there has not been a full and fair trial, or that the witnesses examined at the trial could not be indicted and found guilty of perjury, had they given their evidence falsely.

O'BRIEN, J.

I quite concur in the judgment of my LORD CHIEF JUSTICE. I think this case is clearly distinguishable from the cases relied upon in support of the motion, in this respect, that here, after the defendant became aware of the defect in the summons and plaint, he goes on to trial. Had the defendant succeeded at the trial, the plaintiff would have been barred from bringing another action; but, having taken his chance of the trial, the defendant now comes forward and says that that trial (in which, if he had succeeded, we would have heard nothing of this motion) is to go for nothing. The fact of the defendant having gone to trial distinguishes this case from all the cases cited during the argument. The trial might have been had without any writ at all, if the defendant had appeared and gone to trial.

LEFROY, C. J.

This motion must be refused; but we give no costs as between

the parties. We think, however, that as this alteration has not been made, or this irregularity committed, by the plaintiff's attorney personally, but by some one in his employment, that he should not charge his client with the costs of this motion.

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M'NEILL v. CROMMELIN.

April 16, 27.

COVENANT for rent, upon an indenture of demise of the lands of Skerries, in the parish of Donagh, in the county of Antrim, dated the 12th of July 1824.

Defence.—That, by the said indenture, the lessors therein demised and let, or purported to demise and let, to the defendant, not only the lands of Skerries, in the summons and plaint in that behalf mentioned, but also, together with the said lands, all and singular the bogs, mosses, mines, minerals, quarries of all kind, timber and trees, woods and underwoods, moors, marsh and heath, *tithes great and small*, houses and buildings, water and watercourses, commons, rights, members, privileges, appurtenances and advantages *therewunto belonging, or in anywise appertaining, and therewith usually held, occupied and enjoyed as part and parcel thereof*: saving and excepting out of the said demise certain matters and things as therein mentioned, but not saving or excepting the said lands or tithes, or any of them, or any part thereof respectively: to have and to hold all and singular the said demised premises, with their and every of their appurtenances, unto the defendant, his executors, administrators and assigns, for the term and subject to the rent in the said summons and plaint in that behalf respectively mentioned. And the defendant in fact says that, at the time of the making of the

By indenture of 1824, the lands of S., in the parish of D., were demised, together with all and singular the bogs, mosses, &c., tithes great and small, houses, buildings, &c., appurtenances and advantages thereunto belonging, or in anywise appertaining, and therewith usually held, occupied and enjoyed, as part and parcel thereof. The tithes of the lands were in fact ecclesiastical property, vested in the rector for the time being of the parish of D., and had, ever since the date of the demise, been duly paid by the lessee and his assigns to

the said rector and his successors.—*Held*, upon demurrer, that the indenture was not intended to operate as a demise of the tithes of the lands, and that the rent was not apportionable in respect thereof.

Rules for the construction of general words in deeds and Acts of Parliament.

E. T. 1858. said demise, one Richard Russell, then being the rector or parson of the said parish of Donaghy, was seised in right of his church of all the tithes, as well great as small, of the said demised lands, and M'NEILL v. CROMMELIN. rightfully entitled to, and in receipt and actual possession and enjoyment of the same; and he and his successors, rectors or parsons of the said parish, have thence hitherto continually remained so seised of and rightfully entitled to, and have in fact continually and rightfully received from the defendant and his undertenants respectively the said tithe, or the compositions or rentcharges for the time being payable for or in lieu thereof; whereby the defendant did not and could not obtain the possession of, or have, receive or enjoy the said tithes, compositions or rentcharges, or any of them, or any part thereof respectively; but, from the time of the making of the said demise hitherto, has continually been, and still is, kept out of the possession and receipt and enjoyment of the same, and every of them, and every part thereof respectively, by the said Richard Russell and his successors, rectors or parsons of the said parish, so being seised thereof and entitled thereto as aforesaid: and, in fact, the defendant and his undertenants have, ever since the making of the said demise, hitherto been obliged and forced by the said Richard Russell and his successors, rectors or parsons of the said parish as aforesaid, to render and pay to the said Richard Russell and his successors, rectors or parsons as aforesaid, the entire of the said tithes, and the compositions and rentcharges for the time being, payable for or in lieu of the said tithes, the said compositions amounting to the sum of £16. 5s. 4d. per annum, and the said rentcharges amounting to the sum of £12. 4s. 0d. per annum: whereby the said defendant says he has been wholly hindered and prevented from possessing and enjoying the said tithes, compositions and rentcharges, and every of them, and every part thereof, and from having and receiving the benefit and advantage which might and otherwise would have accrued to him therefrom.

Demurrer to the defence, assigning the following points:—

Firstly.—That the deed of the 12th of July 1824 did not demise, or purport to demise, to the defendant, the tithes issuing out of the lands of Skerries thereby demised.

Secondly.—That the deed did not demise, or purport to demise, E. T. 1858.
to the defendant the tithes of the said lands of which the rector of Queen's Bench
the parish of Donaghys was seized, or to which he was entitled. M'NEILL
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Thirdly.—That the deed did not purport to demise the said lands CROMMELIN.
to the said defendant free or discharged from rectorial or other tithes.

Fourthly.—That, even had the deed purported to demise the
said tithes, the defence is too large; that it should not have been
pleaded to the entire cause of action, and to the entire amount
claimed, but should have been confined to so much of the rent
as is equivalent to the amount payable by the defendant for tithe
out of the said lands, and paid by the defendant to the rector of the
said parish.*

C. Shaw (with him *J. A. Lawson*), in support of the demurrer.

The grounds of demurrer are two. First; upon the true construction
of the lease, there was no intention to pass the tithes, nor did
they pass by it in point of fact. Secondly; even if the lease did
purport to pass the tithes, the defence should have been limited
to so much of the rent as was equivalent to the amount of tithes
or tithe rentcharge paid and payable by the defendant in respect
of the lands demised. As to the first ground of demurrer: the
parcels intended to be demised by the lease are correctly described,
and the words "*tithes great and small*" are to be found only
amongst the general words. It is well settled that general words
in a deed ought not to receive a forced construction, but should
be confined in their operation, so as to meet the true intention of
the parties to the deed: *Meyrick v. Meyrick* (a); *Turpine v. Forrey-*
ner (b); *Lord North v. The Bishop of Ely* (c).—[CRAMPTON, J.

(a) 2 Cr. & J. 223.

(b) 1 Bulst. 99.

(c) Cited 1 Bulst. 100.

* NOTE.—In the year 1836, upon the sale to the plaintiff of the reversion
expectant upon the lease of the 12th of July 1824, the defendant claimed an
abatement of the rent reserved by that lease, in proportion to the annual value of
the tithe rentcharge paid by him; and, pending this disputed claim, the plaintiff
was permitted to retain £500, in order to indemnify himself against the successful
establishment by the defendant of his claim to the abated rent. In the year 1856,
this claim being still disputed, a cause petition was filed by the vendor against the
plaintiff, to recover the balance of the purchase-money, which resulted in this
action being brought to try the rights of the parties.

E. T. 1858. Suppose there had not been any bog, although bog is mentioned in *Queen's Bench*
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CROMMELIN. the general words?]—In that case the general words are to be restricted in construction. The tithes in question did not belong to the lessors when this lease was granted; the rector of the parish was entitled to them, and there could not therefore have been any intention to pass them by the lease: *Herring v. The Dean of St. Paul's* (a). In the case of the *Attorney-General v. Lord Eardly* (b), it was held that the words "*tithes, oblations and obventions,*" occurring amongst the general words in a grant of lands by the Crown, did not pass the tithes of the lands, although such tithes were the property of the Crown, and might have passed, had the intention to pass them existed. That is a stronger case than the present. The defendant covenants in this lease to pay the rent, *clear of "all taxes, charges and impositions whatsoever, quit and Crown rent only excepted;*" and, in construing ambiguous expressions in this deed, the Court may infer, from the covenant to pay the rent clear of all impositions, an absence of any intention to exempt the tenant from his legal obligation to pay the tithe, with quite as much, if not with more, reason than it may infer from the mention of the words "*tithes great and small,*" among the general words, an intention to pass that which it is admitted did not belong to the grantor.

As to the second ground of demurrer: the defence is too large, as it purports to be a plea to the whole action, although it specifies the sum which the defendant has paid for tithe rentcharge. Supposing the lands and tithes to have been demised at an entire rent, it may be urged that this is an action of covenant, and that a covenant is entire and not apportionable: *Gardiner v. Williamson* (c). That might have been an answer to the second objection, had this been an action between the parties to the deed themselves; but that rule does not apply in cases of action by or against the assignees of the original parties: *Stevenson v. Lambard* (d). The eviction in this case, if any, has been by title paramount, and in such case the rent is apportionable: *Co. Litt., 148, b; Doe d.*

(a) 3 Swanst. 492.

(b) 8 Price, 39.

(c) 2 B. & Ad. 336.

(d) 2 East, 575.

Vaughan v. Meyler (a); *M'Loughlin v. Craig* (b); a plea therefore to the whole action is bad. It may be argued upon the other side, upon the authority of *Neale v. Mackenzie* (c), that this is not the case of an eviction by title paramount.—[LEFROY, C. J. It comes round to the first question, did the lessors undertake to demise the tithes, having no right to do so?]—That case is distinguishable from the present, which rather resembles the case of *Tomlinson v. Day* (d), where the lessor agreed to grant a lease of a farm, with the exclusive right of sporting over a manor, and also agreed that the lessee should occupy certain glebe lands; but it turned out that the lessor had not power to give the exclusive right of sporting, or the possession of the glebe lands, and the lessee was, in fact, entirely deprived of such right: yet the lessor was held to be entitled to recover the rent of the land, in an action for use and occupation. Lord Denman, C. J., referring to that case in *Neale v. Mackenzie* (e), says:—“The interruption to the defendant's right of exclusive “sporting was indeed compared by Lord Chief Justice Dallas and “Mr. Justice Richardson to an eviction; but, if it was an eviction, “it was clearly an eviction by title paramount.” The defence, therefore, should have been limited to the sum paid by the defendant in respect of the tithe rentcharge.

D. Lynch and Hugh Law, contra.

As to the form of the plea: the rent is reserved in respect both of the lands and tithes: *Gardiner v. Williamson* (f); and Lord Denman, C. J., in *Neale v. Mackenzie* (g), says:—“We are not aware “of any case where an entire rent reserved has been held to be “apportionable, in which the tenant has not been at some period “subject to the entire rent by virtue of the demise.” The defendant did not obtain all which the lease purported to demise; the rent therefore is not apportionable, and this defence is sufficiently pleaded. The defendant, however, does not seek, in fact, to retain the whole

(a) 2 M. & S. 276.

(b) 7 Ir. Com. Law Rep. 117.

(c) 1 M. & W. 747.

(d) 5 Moo. 558.

(e) 1 M. & W. 764.

(f) 2 B. & Ad. 336.

(g) 1 M. & W. 763.

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E. T. 1858. rent. The real question is, were the tithes intended to pass by the grant or not, and is the defendant entitled to an apportionment of the rent in respect of them? The lease demises the lands of CROMMELIN. Skerries, and also certain things, including "*tithes great and small*."

The argument on the other side can only be supported by striking out the words "*tithes great and small*;" but the tithes are expressly granted *nominatim*, and cannot, therefore, upon true principles of construction be rejected. It is true that the sentence in which the "*tithes great and small*" are mentioned, amongst the various things expressed to be demised with the lands, concludes with the words "*thereunto belonging or in any manner appertaining, and therewith usually held, occupied and enjoyed as part and parcel thereof*;" but these words cannot be held to apply to the tithes, for tithes are in their nature different from mooses, rights of way, or the like; these latter may or may not exist as part of or appurtenant to lands: but tithes must exist as matter of law, although the right to receive them may be dormant: *Priddle and Napper's case* (a); they can only be part of a rectory, and cannot be appurtenant to land: 1 *Eagle on Tithes*, p. 26; *Com. Dig.*, tit. *Dimes*, A; the words "*as part and parcel thereof*" must, therefore, be applied, *reddendo singula singulis*, to the several preceding subject-matters to which they are properly applicable, and not to tithes, to which they are not applicable. Had the lessors been seized of the tithes, it cannot be contended that they would not have passed: the grant of them would not have been defeated by applying to them the subsequent words, which would of themselves nullify the grant; these words would in such case, no doubt, be applied only to the boga, mooses, &c., to which they are strictly applicable, as,

"If one grant his manor of S., *necnon* [also] *omnes mariscos suos de S., ac omnia terra, tenementa, &c., in S. et alibi dict' Maner spectan.*; by this grant the marsh doth pass, though it be no part "of the manor :" *Shep. Touch.*, p. 99. Unless, therefore, the construction of this instrument is to depend upon the extraneous circumstance of whether the tithes did or did not belong to the grantor, a similar construction must be given to this deed. The

(a) 11 Rep. 8 b, 15 a.

case of *The Attorney-General v. Lord Eardley* (*a*) is distinguishable upon several grounds; that was a Crown grant; the tithes had been demised by the Crown previous to the grant, and new leases of them were granted as often as they reverted. A successful suit had been instituted in Chancery, by the lessee of the tithes against the occupiers of the lands, soon after the grant of the lands had been made, which Richards, C. B., considered as "a judicial construction of the grant" (*b*); the lands were extra-parochial, and the King was, therefore, entitled to the tithes in right of the Crown; and lastly, "*oblations and obventions*" are charges payable to the parson of a parish: *Com. Dig.*, tit. *Dimes*, B. It was therefore held in that case, that the words "tithes, oblations and obventions" had crept in by inadvertence. The cases upon this subject are all reviewed in *Chapman v. Gatcombe* (*c*). As to the argument that the rent was to be paid clear of taxes, charges and impositions, it is settled that tithes do not fall within these words: *Parkins v. Hinde* (*d*).

Cur. ad. vult.

LEFRAY, C. J., now delivered the judgment of the Court.

It happens that, in this case, the state of facts precisely coincides with, and corroborates the construction which, according to the principles of law, ought to be put upon this instrument. It appears by the defence upon the record, that at the time of the grant, the tithes, manifestly in point of right and title, were actually outstanding in another person. Now, it is very true, that if that were all the ground which the plaintiff here had to stand upon, Mr. Law's observation upon the case of *The Attorney-General v. Lord Eardley* (*e*) would be in point, namely, that the grant of the Crown should be construed differently from the grant of a subject; and therefore, if it stood simply upon the ground that the tithes were vested in another person, that case would not apply to the present. But we come to the construction to be

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(*a*) 8 Price, 39.

(*b*) See p. 72.

(*c*) 2 Bing., N. C., 516; S. C., 2 Scott, 738.

(*d*) Cro. Eliz. 161.

(*e*) 8 Price, 39.

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E. T. 1858. put, in point of law, upon the words of this lease. It is perfectly true that it grants "*tithes great and small*," and if there were no other words in the grant but those, the grantor would be answerable for granting that to which he had no title. But in construing this, or any other deed, or, in construing an Act of Parliament, the rules of construction are these: first, you must give to every word, as far as possible, a meaning, and apply it in its proper meaning. But secondly, and as a corollary to that rule, where there are general words of description, following an enumeration of particular things, such general words are to be construed distributively, *reddendo singula singulis*; and if the general words will apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply: that rule is beyond all controversy.

Another rule, which is equally beyond controversy, is this: if there are general words of the same kind, which, if applied to other general words, would render them insensible, and would avoid the grant of the things granted, these insensible words should not only not be so applied, but further—they should be rejected: and this rule applies also even in the case of Acts of Parliament; nay, even in pleadings, when the strictest rules of pleading existed, the maxim of law was, *utile per inutile non vitiatur*. Words, therefore, which if applied to particular things would be insensible, and without force, and would vitiate the great subject-matter of the grant, or Act of Parliament, should be rejected rather than applied.

Now, bearing all these rules in mind, let us look at the instrument before us. First, it grants the land, and after the description of the land, and amongst the general words, it grants the "*tithes great and small, therewith usually held, occupied and enjoyed*." Now, when we look at the facts which appear upon this record, we see that the tithes in question, so far from being "*therewith*" (that is with the land) "*usually held, occupied and enjoyed*," were, at the date of the lease, in the seisin and rightful possession of another person (namely, the rector of the

parish), and not of the grantor; and it was for this reason that E. T. 1858. I said that the facts of the case coincide with the result, which ^{Queen's Bench} I will now show exists, in point of law.

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This is not a grant of tithes generally, arising out of these CROMMELIN. lands; but a grant of tithes "*usually held, occupied and enjoyed therewith;*" in fact, there were none so held, occupied and enjoyed. However, it was ingeniously argued by Mr. Law, although without solid foundation, that the words which follow (namely, "*as part and parcel thereof;*") qualified the words "*held, occupied and enjoyed;*" because, it was argued, no tithes can be part and parcel of the land. It is true that tithes cannot be part and parcel of the land, and consequently these words, "*as part and parcel thereof,*" would be utterly insensible in respect of tithes, and they must, therefore, be applied distributively to those things to which they can apply, namely, bogs, mosses, mines, minerals, &c., and not to tithes, to which they are inapplicable; because tithes are not part and parcel of the land, but are collateral to, and arising out of land, and not the land itself. Now, look at this construction of the deed, and the facts, and see how exactly the construction answers to the state of facts, and shows, that the parties never in fact or in law could have designed to warrant these tithes as part and parcel of the grant. We are clearly of opinion, that the construction which has been attempted to be put upon this deed cannot prevail; and, in fact, it comes round to this proposition: there were no such tithes, and, therefore, they did not come within the grant, so as to sustain an action on the warranty, any more than if there were no houses, no bogs, no water, &c. There were no tithes answering to the description; and we cannot, therefore, give to this instrument a construction not warranted either by law or by fact.

Demurrer allowed.

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May 4.

To an action by the indorsee against the drawer of a bill of exchange, the defendant pleaded that a bill similar to that sued on, and purporting to be accepted by him, was shown to him by the plaintiff's agent, who was then informed by the defendant that the acceptance was a forgery; but at the agent's request, and without having then or since received any consideration for so doing, the defendant wrote his name as drawer under the forged acceptance; and that, subsequently, at the request of the plaintiff's agent, the defendant signed and indorsed over to him the bill which was now sued on, and received back the spurious bill; and that, save as aforesaid, the defendant did not receive any consideration for the making or indorsing of the bill sued on.—*Held*, upon demurrer, that the defence was not an answer to the action, it being consistent with the defence, that the plaintiff was the holder of the bill for value.

* PERRIN, J., *absente*.

his custody, as such agent of the said co-partnership, with the full knowledge that the defendant's name, as acceptor thereto, had, in the first instance, been forged thereto. And the defendant further says, that afterwards, to wit, on the 15th of September 1857, he, the defendant, at the express request of the said J. H. Vize, as such agent of the said co-partnership, signed the bill of exchange in the summons and plaint mentioned, and indorsed the same; and the said co-partnership, through their said agent, became the holders thereof in substitution for the said spurious bill before mentioned; and thereupon the said J. H. Vize gave up to the defendant the said spurious bill; and the defendant says that, *save as aforesaid, he did not at any time receive from the said J. H. Vize, or from the said co-partnership, or from the said Hugh M'Manus, or any other person, any consideration* for the making or indorsing of the said bill in the summons and plaint mentioned.

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Demurrer, upon the following grounds:—That it is consistent with the said defence that a good and valid consideration was given by the said co-partnership for the writing of the defendant's name on the first bill of exchange in the defence mentioned, and that there was good and valid consideration for the bill of exchange sued on; that it is consistent with the said defence that the said co-partnership gave good and valid consideration for the bill of exchange in the plaint sued on, and held the same for value; that the facts stated in the defence afford no answer to the plaintiff's demand on foot of the bill of exchange sued on; that it is consistent with the said defence that full value was given by the said co-partnership to the said H. M'Manus on the said bill of exchange in the defence firstly mentioned, and that there was full value and consideration for the bill of exchange sued on; that the defence shows a good consideration for the bill sued on as against the defendant; that the defence neither traverses nor confesses and avoids the cause of action stated in the plaint.

E. Sullivan (with him *Macdonogh*), in support of the demurrer. The defence is, that the defendant did not receive consideration for the bill; but it is perfectly consistent with this defence, that the

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not that the Bank did not give consideration to him, but that they did not give consideration to any person for the bill.—[LEFROY, C. J.]

The defendant does not allege that M'Manus' name was a forgery.]—In *Mathers v. Lord Maidstone* (*a*), a forged bill was given up for a new acceptance, and it was held that there was consideration for the new bill. The other side cannot say, that this being a case of forgery, the bill sued on was given to stifle prosecution, because, in that case, it should have been averred that the bill was indorsed as a consideration for compounding the felony: *Wallace v. Hardacre* (*b*).—[LEFROY, C. J. The defendant gave up a bill upon which unquestionably the drawer was liable.]—Yes; that is the point put by Lord Ellenborough, C. J., in *Wallace v. Hardacre*; he says:—"It was common enough, upon discovering "that bank-notes or bills of exchange had been forged, to send "them back to the persons from whom they had been received, "and to get others that were valid in their stead. But it would "be too much to say, that the consideration for these last was "corrupt and illegal, and that they could not be rendered available "in the hands of those whose object in getting possession of them "was merely to exchange securities that were forged for others "without this vice." There is sufficient consideration apparent upon the record to sustain the bill sued on, and this demurrer must be allowed.

J. Kernan (*T. O'Hagan* being absent), contra.

This defence must be taken to be true, and it avers that the acceptance on the bill shown to the defendant was a forgery, and that he so expressly informed the plaintiff. A bill of exchange imports a consideration, but only until the circumstances under which it was obtained are explained. Here, it appears that the defendant drew the bill at the request of the plaintiff's agent, and, therefore, at the request of the plaintiff: the defendant received no consideration for the bill from his indorsee, or from

(*a*) 18 C. B. 273; S. C., 3 Jur., N. S., 112; 26 Law Jour., C. P., 58.

(*b*) 1 Camp. 45.

any one else; and this being an action by the indorsee against E. T. 1858.
 the indorser, the want of consideration passing to the defendant *Queen's Bench*
 is a defence to the action. The defendant having become a party *M'KENNA*
 to the original bill without consideration, and at the request of *v.*
 the plaintiff's agent, and the giving up that original bill, and *DOWDALL.*
 getting a renewed bill, is no consideration for the renewed bill:
Southall v. Rigg (a); Byles on Bills, 7th ed., p. 124. In an
 action by an indorsee against the party who indorsed the bill to
 him, it is immaterial whether a prior indorser of the bill received
 value for the bill or not; but the case is different when the action
 is between the immediate parties.—[O'BRIEN, J. The allegation
 is that the defendant indorsed the bill, and that the Bank became
 the holders of it in substitution for the spurious bill. Does not
 the word "*indorsement*" imply consideration?]—Yes, until the
 circumstances are explained.—[O'BRIEN, J. It is quite consistent
 with this defence that, after the defendant signed the bill, it was
 discounted, and value given by the Bank.]—If there was a con-
 sideration, the plaintiff may reply that fact.

Macdonogh was not called upon to reply.

LEPROX, C. J.

We must allow this demurrer.

(a) 11 C. B. 481; S. C., 15 Jur. 706; 20 Law Jour., C. P., 145.

MACDONA v. SWINEY.

*April 26, 27,
28.*

May 5.

TROVER.—The summons and plaint contained counts for the conversion and carrying away of the plaintiff's goods; also counts for money received by the defendant, to the use of the plaintiff; and on

The mere continuance in possession, by the debtor, of property which he has assigned by bill of sale to his creditor, is not, *per se*, such a badge of fraud as renders the bill of sale fraudulent and void; it is *only prima facie evidence of fraud.*

Continuance in possession, to render such a transaction void, must be accompanied by other circumstances, from which the jury may arrive at the conclusion that its object was fraudulent.

The question of fraud or no fraud is *always* one for the jury, not for the Judge.

E. T. 1858. an account stated.—Defence. A traverse of the three several counts,
Queen's Bench and also a special defence, that a writ of *fieri facias* for £81. 4s. 0d.
MACDONA debt, and £7. 4s. 0d. costs, at the suit of James W. Doherty against
v. the Rev. Moore O'Connor, was delivered for execution to the defendant, as the Coroner of the county of Donegal; and that under
SWINEY. and by virtue of such writ, defendant seized such goods, as being
the goods of the said Moore O'Connor, and in his possession. At
the trial, before O'BRIEN, J., at the Sittings in Dublin after Hilary
Term, on the 8th of February 1858, it appeared that the plaintiff
claimed the goods in question, under a bill of sale executed to him,
in consideration of £250, by Samuel Crookshanks, the Under-sheriff
of the county of Donegal, on behalf of the High-sheriff, and bearing
date the 19th of January 1857, for the purpose of securing to
the plaintiff the amount due to him for goods supplied and money
lent by him to O'Connor. The bill of sale was executed at the
house of the Under-sheriff in Derry, a distance of twenty miles
from the rectory of Culdaff, the residence of O'Connor. At the
time of the execution of the bill of sale, the bailiffs of the Sheriff
had held in possession at Culdaff, for five days, under a writ of *fieri
facias*, issued by the plaintiff against O'Connor. Immediately
upon the execution of the bill of sale, the Under-sheriff gave a
release to O'Connor, and thereupon the bailiffs were removed,
and O'Connor remained in possession of the goods as before. Early
in July 1857, the plaintiff, having ascertained that O'Connor was
about to leave the country, went down to Culdaff, but O'Connor
had left before his arrival. On that occasion he found three of
O'Connor's servants in the house; at the same time he made an
examination of the articles found in the house, with those mentioned
in the bill of sale, and ascertained that several of them had been
taken away, and, amongst the rest, almost all the plate, but without
his sanction or knowledge. A few days after the plaintiff's arrival
at Culdaff, he went to Derry, where he handed the bill of sale to
one Walters, an auctioneer, with directions to sell the property
comprised in the bill of sale. Accordingly, handbills, advertising
the sale for the 17th of July, were issued, in which the property
advertised to be sold was described as that of the Rev. Moore

O'Connor. The plaintiff in the meantime having gone to Dublin, one of the handbills was sent to him, and returned by him approved of. Walters, having gone on the 16th of July to Cudlaff, for the purpose of comparing the articles in the house with those mentioned in the bill of sale, met the defendant, who told him he had an execution against O'Connor's goods, at the suit of one Doherty, which he would lay on the goods advertised for sale. The defendant, having been apprised by Walters that the plaintiff was a creditor to a large amount, nevertheless asked Walters to act as auctioneer, for him, consenting not to lay on the execution until the next morning, so as to enable Walters to make up his mind and communicate with the plaintiff. Walters at first refused to act, but ultimately consented to do so, having on the 17th of July written to the plaintiff. Accordingly, the next day, the 17th of July, Walters proceeded to sell the goods, until there was realised an amount sufficient to satisfy Doherty's execution, whereupon the defendant told him he would have nothing further to do with the sale; but, at the request of Walters, consented to act as his clerk for the rest of the day, when about £14 was realised. The sale was continued on the 18th of July, when £31. 1s. 1d. was realised. In August, the defendant returned the writ under which he had seized, having indorsed thereon the manner in which he had executed it. On the 9th of November 1857, the plaintiff's attorney wrote to the defendant, informing him that he had been directed by the plaintiff to take proceedings against him for the recovery of the value of the property so improperly seized by the defendant, and damages for the injury sustained by the plaintiff thereby. After the receipt of this letter, the defendant, on the 23rd of November, paid over to Doherty the amount of his writ. Evidence was also given of two sequestrations—one by the plaintiff, the other by the bishop—issued against O'Connor, about the time of the plaintiff's execution, and of several claims made by creditors of O'Connor at the time of the auction.

At the close of the plaintiff's case, the Counsel for the defendant called upon the Judge to direct a verdict for the defendant, as it appeared that the plaintiff had not got possession of the

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E. T. 1858. goods at the time of the execution of the bill of sale, nor for *Queen's Bench* six months after; and that, as possession neither accompanied nor followed the bill of sale, it should be held fraudulent and void as against the execution at the suit of Doherty; also to direct a verdict for the defendant, upon the ground that there was no evidence to identify the goods which were sold, to satisfy the execution of Doherty, with the goods mentioned in the schedule to the bill of sale; also to direct a verdict for the defendant, on the ground that, by advertising the goods as the goods of O'Connor, and by the other acts of the plaintiff's agent, Walters, the plaintiff and his agent, had placed the defendant in a position in which he was bound to seize the goods under Doherty's writ, and that the plaintiff should be estopped by the acts of his agent from denying that the goods were the goods of O'Connor. But the Judge refused so to do, and left the want of possession, the advertisement and the acts of the plaintiff's agent to the jury, as circumstances proper to be considered by them in deciding whether the bill of sale was intended to defeat or delay creditors; and that, if so intended, it was void. To this direction of the Judge, Counsel for the defendant objected. The jury found a verdict for the plaintiff, with damages.

G. Fitzgibbon having, on the 17th of April 1858, obtained a conditional order for a new trial, on the grounds of misdirection, and the verdict being against evidence and the weight of evidence—

Macdonogh (with him *C. Hemphill*) now showed cause.

The question in this case is as to the validity of the bill of sale of the 20th of January 1857. To render valid such bills of sale, they must be made *bond fide*, and be executed for a valuable consideration: *Twyne's case* (a). In every case the question of fraud or no fraud is one for the consideration of the jury. In 1 *Smith's L. C.*, p. 12, 4th ed., there is this commentary upon *Edwards v. Harben* (b):—"However, though in *Edwards v. Harben*, it was laid down that an absolute sale, without delivery of possession,

(a) 3 Co. Rep. 80.

(b) 2 T. R. 587.

"was, in point of law, fraudulent, the tendency of the Courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of transmutation of possession shall prevail." So in *Latimer v. Batson* (*a*), the question of fraud was held to have been properly left to the jury. If the bill of sale be executed *bona fide* and for valuable consideration, the mere allowing of the debtor to continue in possession does not, *per se*, invalidate the transaction; it is only evidence of fraud, and as such to be left to the jury: *Martindale v. Booth* (*b*). In *Wordall v. Smith* (*c*), Lord Ellenborough considered that, where the continuance of the vendor in possession was fraudulent, the transaction was not helped by the vendee putting a person jointly into possession with him. It will be contended on the other side that they were misled by the advertisement of the auction, which described the goods as those of O'Connor, and that the advertisement having been approved of by the plaintiff, he is estopped from denying that the goods were O'Connor's. But in such cases there must be wilful misrepresentation, and allowing the party continuing in possession to deal with and treat the goods as his own. In *Imray v. Magnay* (*d*), followed by *Christopherson v. Burton* (*e*), it was held that, although the Sheriff (if he have notice of the fraud) is bound to seize and sell, notwithstanding a fraudulent assignment, or judgment and execution, yet, if he sell under such a judgment to a *bona fide* purchaser, he cannot be compelled to re-seize the same goods, for the purchaser has a good title. In *Remmett v. Lawrence* (*f*), Lord Campbell (*g*) said he should like to have the case of *Imray v. Magnay* (*h*) re-considered, as it put the Sheriff in a position subjecting him to serious injury. Then, as to the point of estoppel, *Pickard v. Sears* (*i*) was relied on by the other side, but

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(*a*) 4 B. & C. 652.

(*b*) 3 B. & Ad. 498.

(*c*) 1 Camp. 332.

(*d*) 11 M. & W. 267.

(*e*) 3 Exch. 160; S. C., 18 L. J., Exch., 60.

(*f*) 15 Q. B. 1004; S. C., 14 Jur. 1067; 20 L. J., Q. B. 25.

(*g*) p. 1010.

(*h*) *Supra*.

(*i*) 6 Ad. & El. 469.

E. T. 1858. that case was most fully considered, and the rule enunciated in *Queen's Bench* it put on its proper footing in *Freeman v. Cooke* (*a*). There is also, in this case, that notoriety of the transfer upon which the decision in *Latimer v. Batson* (*b*) mainly rested; for Doherty, the execution creditor, must have been fully aware of all the circumstances, and yet he does not enter up his judgment until the April following, long after the plaintiff's right had accrued.

Fitzgibbon (with him *J. Hamilton*), contra.

It is said, on the other side, that the validity of the bill of sale is a question for the jury; our complaint is, that the learned Judge should have decided that question himself, and not left it to the jury at all. We rely upon three grounds: first, there was no case made by the plaintiff to identify the goods sold with those contained in his bill of sale; secondly, even though the goods were shown to have been the same, yet the plaintiff, by his conduct, had represented the goods to be those of O'Connor, and he is, therefore, estopped; and, thirdly, under the circumstances of the case, the bill of sale to the plaintiff is fraudulent and void. Now, as to the identity of the goods, the plaintiff himself, who was the only witness on that side, at the trial could not identify them; nor could it be proved at what period of the sale the goods of the plaintiff were sold. Secondly, as to the point of estoppel; Lord Denman, in his judgment in *Pickard v. Sears* (*c*), lays down the rule thus (*d*):—"But the rule of law is clear, that when one, by his words or conduct, wilfully causes another to believe the existence "of a certain state of things, and induces him to act on that belief, "so as to alter his own previous position, the former is concluded "from averring against the latter a different state of things as "existing at the same time." Here, after the execution of the bill of sale, the plaintiff allows the goods to remain in O'Connor's possession. The bailiffs who had been in possession are turned out; and, when the sale is announced, the goods are advertised

(*a*) 2 Exch. 654; S. C., 12 Jur. 777; 18 L. J., Exch., 114.

(*b*) *Supra*.

(*c*) 6 Ad. & El. 469.

(*d*) p. 474.

as being O'Connor's; and, when seized by the defendant under Doherty's writ, as the goods of O'Connor, Walters, who represented the plaintiff, though he remonstrated in the first instance, yet positively acquiesces in the sale, and acts as the defendant's auctioneer.—[*LEFROR*, C. J. Was Walters acting within the scope of his authority? Surely, if I give a man authority to do a particular act, that does not confer upon him a general authority, and he cannot estop me by exceeding his authority.]—The plaintiff does not complain of these proceedings; on the contrary, the defendant does not pay over the proceeds of the sale until November; yet the plaintiff, having lain by for three months, on the 9th of that month, for the first time, claims the money, which is the first step ever taken by him to show that he claimed as his own the goods seized and sold by the defendant. This was conduct clearly calculated to deceive the defendant. In cases of this kind, where such facts are admitted or proved, it is a question of law for the Judge, who is to determine whether they constitute an estoppel *in pais*. This appears from the comment of Erle, J., upon *Pickard v. Sears*, in *Foster v. The Mentor Life Assurance Company* (*a*). The same doctrine is laid down in *Freeman v. Cooke* (*b*). The remarks upon estoppels *in pais* in *Smith's Leading Cases* (*c*) are very pertinent. But, thirdly, this bill of sale is fraudulent in law; and that is a question for the Judge, and not for the jury, where there are no circumstances except consideration to rebut the inference of fraud, arising from possession neither accompanying nor following the deed. It matters not that it was duly registered under the 17 & 18 Vic., c. 36, as registration under that statute does not in the least affect the validity in law of a bill of sale. Two circumstances are essential to the validity of a bill of sale against creditors—a good consideration and *bona fides*; neither alone is sufficient. There is consideration here, but nothing else; nothing to show *bona fides*—no possession taken by the vendee, either actual or symbolical—no notoriety attending the execution

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(a) 3 El. & El. 48; S. C., 23 Law Jour., Q. B., 145; 18 Jur. 827;
 2 Com. Law Rep. 1404.

(b) *Supra*. (c) 2 Sm. L. C., 665, 4th ed.

E. T. 1858. of the bill of sale—no evidence that it was known to any one *Queen's Bench*
 MACDONA beyond O'Connor and the Sheriff; there was nothing, therefore, to
v. go to the jury to show *bona fides*. In all the cases cited, there
 SWINNEY. were additional circumstances, beyond the consideration, to show
bona fides, all of which were for the jury; but when there is
 nothing beyond the absolute sale, then it is for the Judge to direct
 the jury, in the absence of evidence of *bona fides*; and all the
 cases show, that when an absolute bill of sale, without such evi-
 dence, is neither accompanied nor followed by the possession of the
 property assigned, it is void in law: *Edwards v. Harben* (*a*); judg-
 ment of Dallas, C. J., in *Armstrong v. Baldock* (*b*), and that of
 Lord Ellenborough, in *Wordall v. Smith* (*c*). In *Latimer v. Bat-
 son* (*d*), the ground of the decision was, that the circumstance of
 the execution was notorious in the neighbourhood, and that the
 money was paid for the goods at the time of the sale. Here,
 there was no notoriety, every part of the transaction was private;
 here, too, the money was not paid down at the time of the sale;
 but the consideration for the bill of sale was an old debt, which
 is a most important element in all these cases. In *Martindale*
v. Booth (*e*), the bill of sale was not absolute. *Jezeph v. Ingram* (*f*)
 is a middle case between *Edwards v. Harben* (*g*) and *Kidd v.
 Rawlinson* (*h*). *Twyne's case* (*i*) is not overruled; it is expressly
 recognised by Lord Eldon, in *Kidd v. Rawlinson* (*k*). The embar-
 rassments of O'Connor, at the time of the execution of the bill
 of sale, appear from the fact of there being then two sequestrations
 against him, and from the numerous claims made by creditors at
 the auction.

They also cited *Beaumont on Bills of Sale*; *Graham v. Chap-
 man* (*l*); *Avery v. Bowden* (*m*).

(*a*) 2 T. R. 587.

(*b*) Gow. 33.

(*c*) 1 Camp. 332.

(*d*) 4 B. & Cr. 652.

(*e*) 3 B. & Ad. 498.

(*f*) 1 B. Moo. 189; S. C., 8 Taunt. 838.

(*g*) *Supra.*

(*h*) 2 B. & P. 59.

(*i*) *Supra.*

(*k*) *Supra.*

(*l*) 12 C. B. 85; S. C., 21 L. J. C. P., 173.

(*m*) 6 El. & Bl. 953; S. C., 3 Jur., N. S., 238; 26 Law Jour., Q. B., 3.

Hemphill, in reply. •

There was every notoriety in this case. When the *fieri facias* was sent down to the Sheriff of Donegal on the 15th of July, O'Connor was a free man to all the world except the plaintiff; and that the Sheriff's bailiffs were in possession at the rectory for five days and nights must have been well known to the whole neighbourhood. Again, the parties were not deceived by the plaintiff's conduct. Doherty was aware of the existence of the bill of sale, and fixed with notice of it, and, therefore, he puts his writ into the hands of the defendant to be executed, thinking that he might not be so well aware of the transaction as the Sheriff. The moment the plaintiff is apprised that O'Connor is about to abscond, he at once goes down to the rectory and takes possession; he is the first to take possession. There has been no acquiescence by the plaintiff in the conduct of Walters, who, as the plaintiff's agent, was acting quite beyond the scope of his authority. Now, as to the authorities; *Twyne's case* (a) is distinguishable in its facts from the present. Twyne, by the assignment, leaves himself a beggar; here, that is not so. The resolutions in *Twyne's case* do not apply; the first, because the goods assigned here by the bill of sale are specific chattels set out in the schedule; the second, because here there was nothing but the mere continuance of O'Connor in possession; the third, because there was sufficient notoriety; the fourth, because, at the time of the execution of the bill of sale, the existence of any other creditor was unknown to the parties; the fifth or sixth, because there are no such elements in the present case. The gist of the whole of that case was that, at the time of the assignment, Twyne was indebted to other persons. In *Edwards v. Harben* (b), we find the same element; the bill of sale in that case was a pocket instrument; there was no execution levied; no sale took place, and there were debts existing. The *dictum* of Buller, J., in *Edwards v. Harben*, has been qualified by more recent decisions. In *Steward v. Lombe* (c), Dallas, C. J., says (d):—"Although the case of *Edwards v. Harben* has not been overruled, still it has

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(a) *Sopra.*

(c) 4 B. Moo. 281.

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(b) *Sopra.*

(d) p. 290.

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E. T. 1858. "frequently been dissented from, and was much narrowed by the *Queen's Bench* subsequent decision of this Court in *Kidd v. Rawlinson*." In *Kidd v. Rawlinson* (a), Lord Eldon concurred in the doctrine as laid down in *Bul. N. P.*, p. 258, that continuance in possession by the vendor was not, in all cases, a mark of fraud; and he left it to the jury to say what was the object of the bill of sale.—[LEFROY, C. J. Lord Eldon does not dissent from the abstract proposition laid down in *Edwards v. Harben*, and, therefore, I do not understand Dallas, C. J., saying that that case has been dissented from.]—The same doctrine is propounded in *Jezeph v. Ingram* (b), *Armstrong v. Baldock* (c), and the reporter's note to the latter case, and also in the judgments of Littledale and Parke, JJ., in *Martindale v. Booth* (d); *Watkins v. Birch* (e) is not distinguishable from *Kidd v. Rawlinson*. *Eastwood v. Brown* (f), though only a *Nisi Prius* case, yet shows how Abbott, C. J., left the question to the jury. *Wordall v. Smith* (g) was relied upon in that case by Mr. Scarlett, as Counsel for the defendant, but Abbott, C. J., said (h):—"I cannot agree to the doctrine laid down in the case cited by Mr. Scarlett. The circumstance of an assignor, who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear, from other facts in the case, that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, I am of opinion, that it is not of itself a conclusive badge of fraud." In *Wood v. Dixie* (i), Lord Denman, C. J., says (k):—"We are always unwilling to decide, without consideration, upon a question involving a discussion upon first principles." Whether the transaction be a *bona fide* one, whether the instrument of assignment is intended to have the operation it purports to have—in a word, the question fraud or no fraud, is one purely and alone for the consideration of the jury.

He also referred to *Beaumont on Bills of Sale*.

Cur. ad null.

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| (a) <i>Supra.</i> | (b) <i>Supra.</i> |
| (c) <i>Supra.</i> | (d) <i>Supra.</i> |
| (e) 4 <i>Taunt.</i> 823. | (f) <i>By. & M.</i> 312. |
| (g) <i>Supra.</i> | (h) p. 313. |
| (i) 7 <i>Q. B.</i> 892; <i>S. C.</i> , 9 <i>Jur.</i> 796. | (k) p. 896. |

LEFROY, C. J.

This case comes before the Court upon a motion for a new trial, founded upon objections to the charge of my Brother O'BRIEN, who tried the case; and also upon the ground that the verdict was not sustained by the evidence, and was against the weight of evidence. The question upon which the first ground of objection arises in the case turns upon the validity of a bill of sale, under which the plaintiff claims. It was contended that, under the circumstances of the case, the bill of sale was fraudulent and void; that the evidence was such that the jury should have been directed, upon the facts before them, to have found that it was so; that, as the bill of sale purported to be an immediate transfer of the goods, and, as the possession did not accompany nor immediately follow the execution of the bill of sale, but, on the contrary, the former owner continued in possession for four months afterwards, that that fact alone, being once established, rendered the bill of sale fraudulent and void.

This was contended, first, upon the authority of *Twyne's case* (a); secondly, upon the authority of *Edwards v. Harben* (b), and the cases referred to therein; but especially upon the *dictum* ascribed to Judge Buller, that, unless possession accompanies and follows the deed, it is fraudulent and void. Now, this being a question of great importance, I have thought it right to go back and examine, most attentively and minutely, all the authorities, so as to ascertain what foundation there is for saying the continuance in possession by the vendor in this case made the bill of sale *ipso facto* fraudulent and void. It appears to me that, neither upon the facts of *Twyne's case* (c), nor of any other case, nor upon the authority of the *dictum* of Buller, J. (considering it with regard to the circumstances of the case in which it was pronounced), did the continuance in possession in this case, *per se*, render the bill of sale fraudulent and void. Now, as to *Twyne's case* (d), what was the nature of the possession in that case? It was a possession implying ownership and *jus disponendi*; it was not a mere naked possession, but was, as I have said, a possession implying ownership and *jus disponendi*, with the knowledge

(a) 3 Co. R. 80.

(b) 2 T. R. 587.

(c) *Supra.*

(d) *Supra.*

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E. T. 1858. and concurrence of the vendee. Pierce, the vendor, not only continued in possession of the goods, but he sold some of them ; he shorn the sheep, and marked them with his own mark. Now there, there was a possession with an implication of ownership and *jus disponendi* ; but that is a very different species of possession from mere naked possession. But let us now consider further the other circumstances which occurred in *Twyne's case (a)*. That was a gift of all the debtor's goods and chattels, real and personal, whatsoever ; there was not a vestige of property left in the debtor ; there was also, at the time of the gift, another creditor, who was proceeding to enforce his debt ; these two circumstances make an essential difference between that case and the present. Further, it is said, in *Twyne's case (b)*, that the circumstances of the case, and the possession, taken together, were signs and marks and tokens of a trust—a secret trust—a trust which enabled the debtor to make use of that deed of conveyance as a protection against his just creditors ; that is, that they might operate as evidence to defeat the deed, but not to render it *ipso facto* fraudulent and void. In *Twyne's case (c)* also the deed was executed secretly, and not upon any open, public or notorious occasion. In the present instance, however, whatever observations may be made upon the case, and which might be very fit to accompany it in going to the jury, at all events it is clear that, upon the occasion when the bill of sale was executed, the Sheriff's officers had been for four or five days in possession of the property, under an execution ; and, accordingly, in every one of the cases, the occasion, and the notoriety of the occasion, upon which the transfer of the property purported to be made, and the way in which it is made, is deemed proper to be considered by the jury. Now, to come to the case of *Edwards v. Harben (d)*. In that case, the bill of sale, after assigning certain articles of property, particularly specifying them, adds :—" And all and every other the goods, "chattels and effects whatsoever, in and about his dwelling-house "at L." There was too an express agreement that, although the deed imported an immediate sale, yet the vendor should remain

(a) *Supra.*

(c) *Supra.*

(b) *Supra.*

(d) *Supra.*

in possession for fourteen days before the vendee should have a right to enter upon the effects and sell them. Now, it is most important to see upon what grounds the Counsel who impugned the validity of the bill of sale, in that case, based his argument. He says:—"In considering this question, the two following principles may be supported; first, whenever the vendor is found "in the actual possession of goods which he has sold, such continuance in possession is *prima facie* evidence of an intent to "delay, hinder or defraud creditors, and throws it on the other "party to rebut it, by showing that the continuance in possession "was with some other view." It is *prima facie* evidence; that is the way Counsel puts it, whose object it was to impeach the deed in that case; but he adds:—"Secondly, whenever there is a "positive agreement between the parties that the vendor shall be "permitted after the sale to have, for any space of time, not only "the mere manual occupation, but also the disposition of the goods "sold, to trade with them as his own, it is an actual fraud upon "the other creditors of the vendor." There, there was an actual, a positive agreement that the vendor was not only to keep possession of the goods, but to deal with them as his own. That was the case of a trader who was daily selling goods, and whose business it was to sell; but, in the present case, O'Connor's possession of the goods was merely a use for convenience, not implying a *jus disponendi*; and if he did sell any of the goods, he sold them contrary to the purpose for which they were left in his possession. Now, in *Edwards v. Harben* (a), that the goods should be left in the possession of the vendor, was part and parcel of the contract. It was upon that ground that Counsel rested his argument; and Buller, J., in giving judgment, says:—"The bill of sale is dated "on the 27th of March 1786, and is a general bill of sale of all "the defendant's household furniture and stock in trade. This bill "of sale is to take effect immediately, upon the face of it; but "there was an agreement between Mercer and the defendant, that "the goods should not be sold until the expiration of fourteen days "from the date of its execution; and no possession was actually

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(a) *Supra.*

(b) 3 T. R. 620.

(c) 2 B. & P. 59.

(d) *Supra.*(e) *Supra.*

in the case of *Arundel v. Phipps* (a), in which Lord Eldon has occasion to review this doctrine, that he adheres most distinctly to his former opinion expressed in *Kidd v. Rawlinson* (b). Alluding to the difference of opinion between himself and Lord Ellenborough, he says (p. 145):—“I believe my decision in the Court of Common Pleas was disputed; my opinion upon the trial of ‘that cause was, that possession is only *prima facie* evidence of fraud; with great deference, if Lord Ellenborough thinks otherwise, I am at present of the same opinion.” And he then proceeds:—“The mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown, under which that possession has followed.” Now, in the present case, if the sale, under the Sheriff’s bill of sale, was a *bond fide* transfer of the property, the possession of O’Connor was with the permission of the true owner, which brings it exactly within the reasoning in the case before Lord Eldon; and this brings the present case exactly to this point, was the sale by the Sheriff to Macdona, and the bill of sale executed by him in pursuance thereof, a *bond fide* transaction? That was a proper question to be left to the jury; it was for them to deal with it; they have dealt with it, and have found that it was a *bond fide* transaction; and I confess that, after looking through the evidence, and considering the case, I think that the verdict is perfectly right.

Upon the whole, therefore, we think that the rule for a new trial must be refused, with costs.

CRAMPTON, J.

This is an extremely clear case; I have thought so from the beginning. All the cases upon the subject are brought together and ably commented upon, in Mr. Smith’s admirable collection of *Leading cases* (a). I think that the charge of the learned Judge at the trial was perfectly correct; and I know this, that if I had

(a) 10 Ves. 145.

(b) *Supra*.

(c) 1 Smith L. C., 4th ed., p. 1.

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been a member of the jury, I should have arrived at the same conclusion which they did : for, what was the question submitted to the jury? It was this, whether the particular bill of sale in question was fraudulent and void *ab inceptu?* Now, when I state the single fact which I am about to mention, it puts an end to the case. It was argued that this bill of sale was fraudulent and void against creditors, and it must have been so *ab inceptu*, in order to sustain that proposition ; but I cannot see how that position can be sustained, when it is an admitted fact that there was not only no execution creditor in existence at the time of making the bill of sale, but there is no evidence of the existence of any creditor at all at that time. How then can it be said that this instrument is void against creditors, when there were no creditors? Now, I do not mean to say that many cases might not be put, in which fraud might be suggested, though it is not suggested in the present case. I can conceive a man, I will call him A, allowing another man B to use A's property as if it were his own, and in that way giving B the benefit of, and allowing him to hold himself out as the apparent and ostensible owner of the property; and I can conceive B trading with and gaining credit by means of that property ; that would be a very gross fraud, of which we have instances continually occurring, and questions are raised as to the real owner of the property. But the case here is, that this instrument is void under the statute (*a*), as intending to defeat creditors ; but there were no creditors when the bill of sale was executed. I am of opinion, therefore, that the learned Judge was quite right in leaving the question to the jury, and that the jury have found a proper verdict.

PERRIN, J.

I consider that this was a question for the jury, under the direction of the learned Judge ; and as the learned Judge very properly left the case to the jury, I see no ground for interfering with the verdict.

(a) 10 Car. 1, sess. 2, c. 3.

O'BRIEN, J.

I am of opinion, as I was at the trial, that I was bound to leave the question to the jury. It is not necessary to go into the general question; but I may remark that, upon looking through the cases, I could not find a single one in which the Judge took upon himself to pronounce the deed fraudulent and void, without leaving the case to the jury. In the case of *Wordall v. Smith* (*a*), in which Lord Ellenborough is said to have done so, he did not do any such thing; there was a strong opinion of his own expressed, but no direction was given, and the report says the plaintiff had a verdict. I also find that, in a case decided two or three years previously, the case of *Hoffman v. Pitt* (*b*), the same Judge says (*c*) :—“The ‘not taking possession was, in some measure, indicative of fraud, “but was not conclusive;” and as this case was decided after that of *Edwards v. Harben* (*d*), it clearly shows that his own opinion was that, as a general rule, possession not accompanying or immediately following the assignment was merely *prima facie* evidence of fraud. So also, in the case of *Lindon v. Sharp* (*e*), Tindal, C. J., says :—“The modern doctrine is, that it must be left to the jury “to say, whether the continuance in possession is fraudulent or “not. It is a strong fact, but not conclusive;” it is a strong circumstance to be relied upon, but it is capable of explanation, and, at most, only amounts to *prima facie* evidence.

(*a*) 1 Camp. 332.

(*b*) 5 Esp. 22.

(*c*) p. 25.

(*d*) *Supra*.

(*e*) 6 M. & G. 895.

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FRANKLETON v. SHERLOCK.*

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A watchman appointed by Commissioners under the Towns Improvement (Ireland) Act 1854 (17 & 18 Vic., c. 103) is not the deputy or servant of the Commissioners, so as to render them liable, as such, for his illegal conduct, such watchman not being appointed to perform any duty imposed upon the Commissioners, who, by appointing him, have discharged their duty in that respect, in carrying out the Act.

This was an action for assault, arrest and false imprisonment, brought by the plaintiff, by her next friend, against the Commissioners of the Town of New Ross, in the county of Wexford, by the defendant, their clerk. The defence traversed the assault, arrest and false imprisonment, as alleged. At the trial, before CRAMPTON, J., at the Summer Assizes at Wexford, 1857, it appeared, that about 6½ o'clock on Sunday evening the 1st of November 1856, the plaintiff, while on her way to attend evening service at the parish church, was arrested by one of the watchmen appointed by the Town Commissioners, who charged her with being an improper character. That having been detained for some time in custody, she was discharged by order of one of the Commissioners. That the watchman, being summoned by the plaintiff, to the Petty Sessions, for the assault, was defended by a solicitor retained by some of the Commissioners, but by how many, or whether those so retaining him acted on behalf of the body of the Commissioners, did not appear. At the close of the plaintiff's case, the Counsel for the defendants called upon the learned Judge to nonsuit the plaintiff, or to direct the verdict to be entered for the defendants, referring to ss. 72 and 94 of the Towns Improvement (Ireland) Act 1854 (17 & 18 Vic., c. 103), and citing *Richardson v. Corcoran* (a). By consent of the parties, the learned Judge refused to nonsuit, and directed a verdict for the plaintiff, reserving liberty to the defendants to have it turned into a verdict for them, in case, upon the whole of the evidence, the Court above should think that the plaintiff should have been nonsuited, or that she was not entitled to recover in the action.

Sembly.—Had the Commissioners acted personally, or indirectly abetted the watchman in his illegal conduct, they would have been personally liable.

(a) 7 Ir. Com. Law Rep. 121.

* PERRIN, J., *absente*.

Rollestone having, on the 16th of April, obtained a conditional order pursuant to the leave reserved—

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R. Armstrong (with him *C. Coates*) now showed cause.

It will be said on the other side, that there is no mode provided by the Act of Parliament for working out a judgment, by enabling a rate to be levied for the purpose of paying the damages and costs which may be recovered; but the plaintiff is entitled to judgment, and it will be for her to make it available if she can: *Wormwell v. Hailstone* (a). Unless this action lies against the Commissioners, as such, the plaintiff will be entirely without remedy; for the watchman, it will be said, was acting under the Towns Improvement (Ireland) Act 1854, s. 72; and that, consequently, he is protected. Under section 94, the Commissioners may sue or be sued for any matter or thing done under the provisions of the Act; and doing anything under the provisions of the Act means doing anything in the working out of the Act. It cannot, therefore, be contended, that the Commissioners can only be sued for things rightly done under the Act, because that would make it nugatory, and section 94 would be a complete answer to such an action. The statute, therefore, must clearly contemplate acts by the Commissioners, purporting to be done under its provisions, but which, in reality, are in contravention of the statute; and for these acts, the Commissioners, as such, must be responsible. If this construction be not adopted, it will be impossible to apply section 94. But further, section 94 protects the Commissioners, as well as any officer acting under their direction, from personal liability, if such matter be done, *bondâ fide*, for the purpose of executing the Act. The result of this, therefore, is, that unless this action is maintainable, the plaintiff will have no redress. Again, if the watchman be, as we contend he is, the servant of the Commissioners, their previous direction of, or subsequent assent to, his conduct, is sufficient to render the Commissioners liable. Both these circumstances occur here; their previous direction being given upon their appointment of the watchman, and their subsequent assent being testified by their retaining a solicitor to defend the watchman, and by their paying the costs of such

E. T. 1858. defence. In *Hassard v. Caulfield* (*a*), the keeper of the Marshalsea was liable for the acts of his deputy. Here, the watchman was the deputy of the Commissioners; he arrested the plaintiff, in violation of the Act of Parliament, and the Commissioners are responsible for his acts.

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D. Lynch (with him *Rollestone* and *Edward Johnstone*), contra, were not called upon.

LEFROY, C. J.

In this case a conditional order was obtained, to enter a verdict for the defendants, pursuant to the leave reserved at the trial, against which cause is now shown. This is indeed a very novel case. It is an attempt to make the Commissioners liable, because, under the authority given by the Act of Parliament, they have authorised this man, as their watchman, to act in accordance with its provisions, and therefore it is sought to hold them answerable for all his acts. The Act of Parliament gives the Commissioners authority to appoint watchmen, and when they have done so, and have discharged that duty, they have all that is required of them on this subject in carrying out the Act. The statute does not either expressly or impliedly say, that all the watchman does is to be deemed to be the act of the Commissioners; the statute affords protection to the watchman when he acts in accordance with its provisions. But is there any ground under the statute, or by the general law of the land, for saying, that when he violates the law, quite irrespective of his authority, the Commissioners are, in such case, to be held liable? In the case of *Hassard v. Caulfield* (*b*), which has been referred to as an authority, it will be found that the position of the Marshal of the Marshalsea is very different; the person for whose acts he is held liable is his deputy—every one of whose acts in the discharge of his duty is the act of the principal. But the duty of the Commissioners ceases the moment they have appointed the watchman. He is not their deputy, he is not appointed by them to discharge any duty which belongs to them to discharge. When they have appointed him, no responsibility can arise from the mere act of

(*a*) 7 Ir. Jur. 85.

(*b*) *Sopra.*

appointing him; it would be so monstrous, that the difficulty I feel is, to use language which can make the thing plainer. *Prima facie*, if the Commissioners, as individuals, had gone and acted personally in this matter, or had individually abetted the trespass, they would be individually liable. In the *Carlow case* (*a*), we considered that the action was misconceived, that the Commissioners were not liable in their official capacity, and that, if an action were maintainable at all, it could only be against them personally.

We are, therefore, clearly of opinion in this case, that the cause shown must be disallowed.

CRAMPTON and O'BRIEN, JJ., concurred.

Rule absolute.

(*a*) *Richardson v. Corcoran*, supra.

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THE QUEEN v. DANIEL GALLAGHER and others.

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The facts of this case are stated in *7 Ir. Com. Law Rep.*, p. 19, upon a motion to admit four of the prisoners to bail. It now appeared by affidavit, that the prisoners had been in gaol since October 1857, and that at the Spring Assizes of 1858, holden at Lifford, for the county of Donegal, bills of indictment had been found against them for stealing sheep, and also for maliciously killing, wounding and maiming sheep; but upon the application of Counsel for the Crown, the trial of the prisoners was postponed until the following Assizes.

A former motion to bail prisoners, who were charged with sheep-stealing, had been refused by the Court, upon the ground that the alleged existence of a wide-spread conspiracy, and the pro-

bable indemnification of the bail by a subscription fund, rendered it unlikely that the prisoners would appear to take their trial, if admitted to bail (*7 Ir. Com. Law Rep.*, 19); but no indictment for conspiracy having been preferred against the prisoners at the following Assizes, and indictments for stealing and maliciously injuring sheep only having been found against them, the Court now ordered the prisoners, whose trial had been postponed by the Crown, and who had been in gaol for seven months, to be admitted to bail; it being denied by affidavit, that the subscription fund would be applied otherwise than for the *bona fide* relief of destitution, for which purpose it had been collected. The Court will not detain prisoners in custody upon affidavit of belief that, by a time specified, the Crown will have sufficient evidence to enable them to go to trial.

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Norman (with him *R. Dowse*) now moved that the prisoners might be admitted to bail.

The indictments which have been found against the prisoners are merely for killing and stealing sheep, and no bill for conspiracy has been preferred against them by the Crown. The subscription is solely for the relief of destitution, and not for the purpose of in-

deminifying the bail. The Court will, in its discretion, consider only two things—first, the offence for which the prisoners are indicted; and, secondly, the probability of their being forthcoming to take their trial. To detain the prisoners longer in custody would savour of punishment, rather than of a desire to further the ends of justice by insuring a trial; see the judgments of BURTON and CRAMPTON, JJ., in *Regina v. Woods* (*a*).

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The *Solicitor-General* (with him *J. G. Smyly* and *R. Johnston*), for the Crown, resisted the motion, upon the ground of the extent and long continuance of the offence, which was not one of an ordinary character; the improbability that the prisoners would appear to take their trial; the existence of the subscription fund, which might, and most probably would, be applied by other persons than the secretary and treasurer, for the purpose of indemnifying the bail; and the probability of sufficient evidence being procured by the Crown to enable them to proceed to trial at the next Assizes.*

LEFRAY, C. J.

This case came before us in November last, in the shape of an appeal from the decision of the local Magistrates, who, having all the circumstances before them—being aware of the state of the country, and having a great deal of information which we could not expect to be in possession of, had refused to admit these parties to bail. Upon that occasion, reasons were also stated to the Court, which made it quite possible that the appearance of these persons to take their trial at the next Assizes might not be secured by any reasonable amount of bail; we therefore felt it to be our duty to continue them in custody, pursuant to the decision of the Magistrates. The offence with which the prisoners were then charged was a conspiracy to perpetrate a great public mischief, by the destruction of whole flocks of sheep; and the

(*a*) 9 Ir. Law Rep. 71.

* The Summer Assizes for the county of Donegal are held at Lifford, in the month of July.

E. T. 1858. application to the Court then was, not to admit to bail individuals charged simply with killing or stealing sheep. But, since the case

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to trial, to vindicate the law, and to check this great public mischief: but it now appears that, although they were forthcoming, no bill of indictment for conspiracy has been sent forward by the Crown, or found against these parties; and although bills have been found for stealing and killing sheep, yet there is nothing before the Court to show that this was done in the way of a conspiracy amongst them, of that nature which was formerly suggested. The Crown had an opportunity, during the interval from November last, when we made our former rule, down to the last Assizes, of looking out for evidence, or of preferring such bill as their evidence would sustain; but no bills have been found or sent up, beyond mere bills for sheep-stealing and sheep-killing; others of the prisoners have been discharged, because no indictments at all were found against them. Under these circumstances, it appears to us that it would be a very violent stretch of the jurisdiction of this Court to hold the parties still in custody. They have been in custody ever since October last; abundant time has been afforded for the discovery of evidence; and the present application is resisted upon a speculation that further evidence may be discovered by the next Assizes, with the expression of a strong expectation that it will be discovered by that time. The former suggestion is also repeated, that the subscription fund may be applied in indemnifying the bail; but that is denied by the secretary and treasurer of the fund. We feel that we should be trenching very much upon the principles on which this Court acts, if, upon these grounds only, we were to keep these parties in custody; but, upon the other hand, we are not to discharge them without such reasonable bail as may ensure their appearing to take their trial.

CRAMPTON, J.

I am quite of the same opinion with my LORD CHIEF JUSTICE. If this case came before the Court under circumstances similar to

those under which the former application was made, it might be E. T. 1858.
proper to abide by the rule pronounced in November last; but *Queen's Bench*
the case comes before us now under circumstances different from *THE QUEEN*
those under which we then refused to receive bail. Upon the *GALLAGHER*
former occasion, the Crown was not prepared to prosecute; and
it was the first Session after the arrest of the prisoners; and, in
addition, there was this circumstance, upon which the former rule
was mainly founded, namely, that it was sworn that there was
a deep-laid and wide-spread conspiracy throughout the county,
carried out by the wholesale malicious destruction of sheep, the
property of the Scotch settlers. Indictments might have been
preferred against these parties, for conspiracy; but that course
was not pursued; the Crown have merely preferred indictments
against the parties charged, for sheep-stealing and sheep-killing,
an offence which, in its nature, is properly a bailable offence,
at the discretion both of the Magistrates and of this Court. Again,
the length of time which has elapsed since the parties were arrested
must be considered by the Court. They were arrested in October
last; a Session has been passed by without a trial, and we are
now called upon to detain them in custody until the second Session
in July next. To refuse substantial bail at present would seem
to me, as Mr. *Norman* has very properly observed, more like
punishment than "a safe custody" for the purpose of securing a
trial. The question is, upon what grounds are we to keep these
persons in custody until July? The Crown speculate upon the
likelihood of getting evidence; but they say no more than that the
Crown Solicitor or resident Magistrate "expect" to obtain such
evidence. Can we then keep these parties in custody upon such
speculation? It would be monstrous hard indeed, under such cir-
cumstances, to refuse this motion. These parties must find reason-
able bail, such bail as the law requires, proportioned to their
condition in life.

PERRIN, J.

I am still of the opinion which I expressed in November last.

O'BRIEN, J., concurred.

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E. T. 1858. LEFROY, C. J.

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GALLAGHER These parties; and the Magistrates are within the superintendence and supervision of this Court.

Motion granted.

THE MAYOR, ALDERMEN AND BURGESSES OF
 THE BOROUGH OF DROGHEDA

v.
 REV. EDWARD FAIRTLough.*

May 4, 8.

The Corporation of D., in 1820, demised premises to F., at a rent which, in 1837, by resolution, they granted permission to F. to reduce on payment of a fine; and in 1842, pursuant to such resolution, and in consideration of a fine, and of the surrender of the lease of 1820, the said Corporation granted a new lease to F.'s representatives at such reduced rent. The said Corporation of D. being abolished by the Municipal Corporation Act (*Jr.*), 3 & 4 Vic., c. 108, the reduced rent was duly paid to the new Corporation constituted under that Act, and half-yearly receipts given by them for the same, containing a proviso that "the rent had been so received without prejudice to the right of the Corporation to impeach the title and tenure under which the representatives of F. claimed to hold the said premises." Leases similar to the lease of 1842 having been held by the House of Lords to be void, as contravening the 3 & 4 Vic., c. 108, s. 140, in an action of covenant for rent upon the lease of 1820—*Held*, that the lease of 1820 being a valid instrument, and not surrendered in law, the receipts for the reduced rent were not evidence of an agreement to receive that rent in satisfaction of the rent reserved by the lease of 1820; and that there was no consideration for such agreement.

Payment of a smaller sum, if accompanied by any collateral advantage, however small, may be a satisfaction of a larger liquidated sum.

* PERRIN, J., *absente*.

The defendant was assignee of a moiety of the premises. The first defence, admitting the lease of 1820, and the subsequent abatement of the rent thereby reserved, averred that the plaintiffs, by their then corporate name, on the 18th of August 1837, passed a resolution, and made an order, that the said Edward Fairtlough (since deceased) should be permitted to fine down the rent reserved by the lease of 1820, at the rate of ten years' purchase on a third quarter or portion of the original rent thereof. That the said Edward Fairtlough died without having availed himself of the said order and resolution, and without having fined down the said rent; and after his death, the plaintiffs, by their then corporate name, on the 23rd of July 1841, at a general quarterly assembly then held, ordered that, inasmuch as the said Edward Fairtlough, deceased, had not, in his lifetime, obtained the benefit of the order of the 18th of August 1837, his representatives should be entitled to avail themselves of the terms thereof. That after the making of the said last-mentioned order, and before the execution of the lease next hereinafter mentioned, F. G. Fairtlough and W. Fairtlough, being the then representatives of the said Edward Fairtlough, deceased, duly paid to the treasurer of the then Corporation the sum of £53 sterling, being the amount of one-fourth of the original rent of the said premises, fined down at ten years' purchase; and thereupon, and by an indenture of lease, made and executed on the 15th of January 1842, the said plaintiffs, by their then corporate name, in consideration, amongst other things, of the payment of the said sum of £53, and of a surrender of the lease of 1820, demised to the said F. G. Fairtlough and W. Fairtlough the said premises comprised in the lease of 1820, from Michaelmas 1841, for the term of seventy-eight years and six months, at the yearly rent of £5. 6s. Od. sterling. That the said F. G. Fairtlough died after the making of the said last-mentioned lease, whereupon the defendant became, as executor of his will, entitled to one moiety of the said premises, subject to the moiety of the rent payable thereout. That after the making of the last-mentioned lease, and the surrender of the original lease, the plaintiffs were paid, from Michaelmas 1841 to Michaelmas 1854, the full yearly rent of £5. 6s. Od., which pay-

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E. T. 1858. *Queen's Bench* ments in the whole amounted to the sum of £68. 18s. 0d., and a moiety of which, being the sum of £34. 9s. 0d., in the plaint mentioned, was paid by the said F. G. Fairtlough and the defendant to the plaintiffs. That the plaintiffs, for the considerations aforesaid, from time to time, accepted and received the said sum of £5. 6s. as and for the annual rent of the premises comprised in the original lease, and in full satisfaction and discharge of the rent payable under the original lease prior to the making of the new lease; and the plaintiffs, during the times and years aforesaid, received the said sum of £34. 9s. 0d. in such full satisfaction and discharge of the said rent during the said years, from 1841 to 1854.

The second defence, admitting the lease of 1820, and the abatement of the rent to £11. 9s. 8d. a-year, averred that the plaintiffs, by their then corporate name, made and executed the said lease of the 15th of January 1842, at the yearly rent of £5. 6s. 0d., in pursuance of the orders and resolutions, and for the considerations in the said first defence mentioned. That after the execution of the last-mentioned lease, to wit, from the 1st of January 1842 to Michaelmas 1854, the plaintiffs repudiated that lease, and alleged that the same was void; and the said F. G. Fairtlough, up to his death, and the defendant, since his death, up to Michaelmas 1854, asserted that the same was valid. That the plaintiffs, in the year 1841, and from thence up to Michaelmas 1854, required the representatives of Edward Fairtlough (the lessee in the lease of 1820) to pay the rent of £11. 9s. 8d. payable under the original lease, which they refused to do; but offered to pay the rent of £5. 6s. 0d. a-year reserved by the lease of the 15th of January 1842: and that, thereupon, the plaintiffs agreed with the representatives of Edward Fairtlough to accept, and did accept, from them, and they agreed to pay, and did pay, to the plaintiffs the rent of £5. 6s. 0d. a-year, in full satisfaction and discharge of, and as and for, the year's rent payable out of the premises during the period from Michaelmas 1841 to Michaelmas 1854. That the plaintiffs, from time to time, during the period last aforesaid, agreed to receive, and the representatives of Edward Fairtlough agreed to pay, the lesser rent of £5. 6s. 0d. a-year, on the further agreement, that the receipt of the last-

mentioned lesser rent, payable under the last-mentioned lease, was E. T. 1858.
 not to prejudice the right of the plaintiffs to question and impeach Queen's Bench
 the validity of the lease, and the title and tenure under which the CORPORATION
 representatives of Edward Fairtlough held the said premises under OF DROGHEDA
 the plaintiffs, by virtue of the said last-mentioned lease. That after v.
 the making of the last-mentioned agreement, and in pursuance and
 performance thereof, and for the considerations aforesaid, the repre-
 sentatives of Edward Fairtlough paid to the plaintiffs, from Michael-
 mas 1841 to Michaelmas 1854, the sum of £68. 18s. 0d., being the
 amount of the lesser rent for the period aforesaid, whereof the said
 F. G. Fairtlough and the defendant paid the moiety, being the sum
 of £34. 9s. 0d. in the plaint mentioned; and they paid the same, and
 the plaintiffs received the same, under the circumstances aforesaid,
 and not otherwise. The defendant also pleaded, that the value of
 the defendant's occupation of the premises did not exceed the amount
 with which he was credited by the plaint.

Replication to the first defence.—That the resolution and order
 of the said corporate body, of the 18th of August 1837, were
 respectively made and passed after the coming into operation of
 the statutable enactments made to restrain the alienation of corporate
 property in Ireland, and that the supposed permission thereby given
 to Edward Fairtlough to fine down his rent, as therein mentioned,
 was an alienation of the property of the said corporate body, within
 the meaning and prohibition of the said enactments; and that the
 demise of the 15th of January 1842 was made after the passing of
 the 3 & 4 Vic., c. 108, and was not made in pursuance of any con-
 tract or agreement *bond fide* made or entered into on or before the
 20th of August 1836, by or on behalf of the said body corporate, or
 in pursuance of any resolution duly entered in the corporation books
 of the said body corporate, on or before the said 20th of August,*
 and was and is, by virtue of the said Act, and of the other enact-
 ments against the alienation of corporate property in Ireland, wholly
 null and void. That there never was any surrender of the lease
 of the 13th of November 1820, but that the same was, during all
 the time of the accruing of the rent in the plaint mentioned, and

* 3 & 4 Vic., c. 108, s. 140.

E. T. 1858. still is, a valid and subsisting demise in the law. That the *Queen's Bench* plaintiffs did not accept or receive from the defendant the said CORPORATION OF DROGHEDA annual payments in the defence mentioned, as or for the annual rent of the said premises comprised in the lease of the 13th of November 1820, as alleged, and in satisfaction and discharge of the rent payable thereunder, nor did the plaintiffs receive from the defendant the sum of £34. 9s. 0d., in the defence mentioned, in satisfaction and discharge of the said rent from Michaelmas 1841 to Michaelmas 1854, as alleged.

The plaintiffs also replied to the second defence, in the same terms, that the lease of 1842 was void under the non-alienation statutes, and averred that they did repudiate the lease, and allege the same to be void, and required the defendant to pay the rent reserved by the lease of the 13th of November 1820; and although the defendant did assert the lease of the 15th of January 1842 to be valid, and refused to pay the rent under the original lease, and offered to pay the rent under the supposed lease of the 15th of January 1842, as in the defence mentioned, yet the plaintiffs did not agree to accept from the defendant, nor did they accept, nor did he pay to the plaintiffs, the sum of £5. 6s. 0d. a-year, in the defence mentioned, in satisfaction or discharge and for the yearly rent payable out of the premises, as alleged; neither did the plaintiffs, from time to time, or at any time during the periods from November 1841 to November 1854, agree to receive, nor did the defendant agree to pay, the moneys, in the defence called the lesser rent, on any agreement by the plaintiffs that the receipt thereof was not to prejudice the right of the plaintiffs to question and impeach the validity of the lease of 1842, or the title and tenure under which the representatives of Edward Fairtlough held the said premises under the plaintiffs, by virtue of the last mentioned lease. That the only terms upon which the plaintiffs received the said moneys, called the lesser rent, were and are expressed in written receipts, not under seal, passed and given by the plaintiffs to the representatives of Edward Fairtlough, on the occasion of the said respective payments; and that the same were and are the only writings in that behalf, and are in the words and figures following, and to the like effect for

each of the said payments:—"Received from representatives of E. T. 1858.
 "Edward Fairtlough, Esq., the sum of £5. 6s. sterling, being half
 "year's rent due to the Corporation of Drogheda, up to and ending
 "the — day of — for lands at Sunday's Gate; and which rent
 "has been so received without prejudice to the right of the said
 "Corporation to question and impeach the title and tenure under and
 "by virtue of which the said representatives of Edward Fairtlough
 "claim to hold the lands and premises out of which the said rent
 "has accrued."

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The material issues were as follows:—Second.—Did the plaintiffs accept the payments in the first defence mentioned, as and for the annual rent of the premises comprised in the lease of the 13th of November 1820, and in full satisfaction and discharge of the rent payable thereunder prior to the making of the lease of 1842, as in the defence alleged?

Third.—Did the plaintiffs receive the sum of £34. 9s. 0d., in the first defence mentioned, in satisfaction or discharge of the rent payable in respect of the demised premises, from November 1841 to November 1854, as in the first defence alleged?

Fourth.—Did the plaintiffs agree to accept, and did they accept, the sum of £5. 6s. 0d. a-year in satisfaction or discharge, and as and for the yearly rent payable out of the premises, as in second defence alleged?

Fifth.—Did the plaintiffs from time to time, or at any time during the period from November 1841 to November 1854, agree to receive the moneys in the second defence called the lesser rent, on an agreement that the receipt thereof was not to prejudice the right of said plaintiffs to question and impeach the validity of the said lease of 1842, or the title or tenure under which the defendant and the said W. Fairtlough held the lands and premises under the plaintiffs by virtue of the said lease?

Upon the trial, before CRAMPTON, J., at Dublin, at the After-sittings after Hilary Term 1858, the defendant gave in evidence the lease of 1842, the resolution of the 18th of August 1837, the minutes and entries in the books of the Corporation relating to the fining down of the rent of the said premises, and the several receipts

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FAIRTLough. 1854. The learned Judge then directed the jury to find for the plaintiffs on the second and fourth issues respectively, upon the ground that the receipts produced did not evidence any such acceptance as in those issues respectively mentioned; and also to find for the plaintiff on the fourth issue, on the ground that there was no evidence of any consideration, to sustain an agreement to accept the lesser sum in satisfaction of the larger rent; to which direction of the learned Judge the Counsel for the defendant excepted. The jury found as directed.*

E. Sullivan (with him *W. E. Exham*), in support of the bill of exceptions.

First; if there is evidence of the alleged agreement, there is sufficient consideration to support it: the receipts are evidence of such an agreement. We admit that, where the demand is liquidated, payment of a lesser sum cannot, *per se*, be a satisfaction of the greater sum; but if, with the payment of the lesser sum, any benefit or advantage, however small, be thrown into the scale, a sufficient consideration is raised, and the payment of the lesser sum operates as an accord and satisfaction for the greater sum. That is the true principle established by *Cumber v. Wane* (a), as qualified by *Sibtree v. Tripp* (b), and the other modern cases which are collected in 1 *Smith's Leading Cases*, 4th ed., p. 245. To apply that principle to the present case: during the period from 1841 to 1854, which is covered by the receipts for the smaller rent, the validity of the lease of 1842 was a *verata quæstio*, it had not been adjudged to be void; on the contrary, the point was in the course of litigation both in this Court and the Court of Exchequer Chamber in Ireland: *Corporation of Drogheda v. Holmes* (c). The decision of the

(a) 1 Str. 426.

(a) 15 M. & W. 23.

(c) 11 Ir. Law Rep. 348.

* NOTE.—The points of the exceptions were as follows:—That the receipts for rent, passed by plaintiffs, evidenced the acceptance by the plaintiffs of the payments made for rent, as or for the annual rent of the premises comprised in the lesse of the 13th of November 1820. That there was evidence of consideration, to sustain an agreement to accept the lesser sum in satisfaction of the larger rent.

House of Lords, holding these leases to be invalid, was not given until the year 1855: *Corporation of Drogheda v. Holmes* (*a*). During all this period the defendant relied upon the lease of 1842: the plaintiffs impugned it, and demanded the rent under the lease of 1820; and the defence avers that the defendant refused to accede to that demand, but offered to pay the rent under the lease of 1842, in full discharge of the yearly rent, which payments the plaintiffs agreed to receive and did receive. The plaintiffs thus obtained a substantial benefit; because, had they sued the defendant upon the covenant in the lease of 1820, the lease of 1842, which at that time was apparently a valid lease, would have been a complete answer to the action, operating in law as a surrender of the former lease. The fact of that surrender, and the payment of the fine of £53, are recited in the new lease as part of the consideration for that lease. The plaintiffs, therefore, would have been driven to litigate the matter, and the withdrawal of litigation is sufficient to raise a consideration, even where the plea which is withdrawn is in fact false: *Cooper v. Parker* (*b*).—[CRAMPTON, J. Do you contend that if a right be asserted upon the one side, and denied upon the other, but no litigation ensues, that the withdrawal of the right amounts to a consideration in point of law?]—Yes, if the dispute involves a substantial question. The whole tendency of modern authority is to relax the stringency of the Common Law rule that a man shall not be at liberty, if he pleases, to take a smaller sum in satisfaction of a greater one.—[LEFROY, C. J. It is not averred by the pleading that the waiver of litigation was part of the consideration for accepting the reduced rent.]—Not in terms, but it is to be inferred from the facts set out—the position in which the parties stood in relation to each other, and the receipts for the rent reserved in the lease of 1842.—[LEFROY, C. J. The consideration for an agreement must appear upon the face of it.]—But the question of consideration is not now open to the other side; that question might have been raised specifically upon the pleadings. The defence sets out facts which establish a consideration, and those

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(*a*) 5 H. L. Cas. 460.

(*b*) 15 C. B. 622; S. C., 1 Jur., N. S., 281; 24 L. J., C. P., 68.

E. T. 1858. facts, not having been traversed, must be taken as admitted ; if then, *Queen's Bench* they did not amount to a consideration, the plaintiffs should have *CORPORATION OF DROGHEDA* demurred ; and we contend that the consideration does sufficiently *v.* appear on the agreement. Secondly, as to the fact of the agreement *FAIRTLough.*

alleged in the defence : the evidence of the agreement is the receipts for the lesser rent from 1841 to 1854. Had the Corporation intended to reserve a right to fall back upon the old rent, they would have stated so in terms ; but the receipts are expressed to be for the "*half-year's rent due to the Corporation up to and ending*" at a particular date, and the right reserved is merely to impeach the "*title and tenure*" of the defendant. Rent is a *reddendum* in respect of the land ; it is no part of title or tenure.—[CRAMPTON, J. If the receipts had been merely in common form, without any reservation at all upon the face of them, when the lease of 1842 was declared to be void, could not the Corporation have proceeded to recover the entire rent?]—Not exactly, because it would be open to plead payment of part and a gift of the residue ; and a jury would be perfectly warranted in finding for the gift : *Sibree v. Tripp (a)*. It follows then that the reservation was introduced for some object. What was that object ? It was not to reserve a right to the Corporation, because they possessed it already ; it must therefore have been for the purpose of protecting the defendant from being sued for the back rent ; but, at the same time, not thereby to throw any obstacle in the way of the Corporation proceeding to invalidate the lease of 1842. Many ways may be suggested in which it would have been for the advantage of the plaintiffs to have acceded to that compromise.

Macdonogh and S. Ferguson, contra.

There is no evidence of any such agreement as is alleged. In 1 *Smith's Leading Cases*, 4th ed., p. 248, in commenting upon the effect of a *receipt in full*, for all demands, where there is no consideration for the relinquishment of part only of a liquidated demand, the result of the cases is thus stated :—"It is clear, both upon general principle, and from the decisions in *Fitch v. Sutton (b)*, and

(a) 15 M. & W. 23, 33.

(b) 5 East, 230.

"other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied." Therefore, the fact that these receipts are for rent up to a particular day does not conclude the plaintiffs in this action. To make the payment of the lesser rent a satisfaction for the greater rent which is now claimed, the discharge from or release of the residue must have been under seal, or some collateral advantage or benefit must accrue thereby to the party abandoning his right. In *Co. Lit.*, 212 b, it is laid down, in case of covenant under seal, that "The obligor or feoffor cannot, at the time appointed, pay a less sum in satisfaction of the whole, because it is apparent that a less sum cannot be a satisfaction of a greater; but, if the obligee or feoffee do, at the day, receive part, and thereof make an acquittance, under his seal, in full satisfaction of the whole, it is sufficient." That passage applies especially to the present case, because a Corporation can only contract under seal. The case of *Sibtree v. Tripp* (a) establishes that collateral benefit will turn the scale; but what advantage did the Corporation derive from this dealing? Had there been no reservation in the receipts, the corporate rights would not have been prejudiced: *Fitch v. Sutton* (b); *Fur. Land. & Ten.*, p. 919, s. 41; but a reservation is inserted, to place the matter beyond doubt; and is it to be said, that what was introduced for their advantage shall enure to their prejudice? Ejectment would not lie during the continuance of the old lease. There was no way of impeaching the *title and tenure* under the new lease, but by distress or action for the rent reserved by the old lease: the stipulation, therefore, which saved the right of the Corporation to impeach the lease of 1842 was, in effect, a proviso that the receipt of the lesser rent should not prejudice the right of the Corporation to demand the greater rent—the very point upon which the defendant's argument would give it the contrary operation, making it destructive of the right which it is designed to save. The lease of 1842 had no existence in law; the lease of 1820 therefore was not surrendered; and the result upon the pleadings is, that the Corporation, in consideration of nothing,

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E. T. 1858. agreed to take a less sum for a greater. The lease of 1842, being
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 otherwise, against the plaintiffs; and they were not benefited, as
 v.
 TAINTLOUGH in *Cooper v. Parker* (*a*), by the relinquishment of litigation.—

[LEFROY, C. J. Until the decision of the House of Lords upon the matter, there was a question as to the validity or invalidity of the lease of 1842. The point is, what is the meaning of the reservation in the receipts? The word "rent" occurs in the body of the receipt; the words "title and tenure" only in the saving of the rights of the Corporation. Then, upon the maxim *expressio unius est exclusio alterius*, one part of the defence raised is, that the Corporation was to be at liberty to establish the invalidity of the title under which the defendant claimed to hold; but not to go back upon the past rents. Why was this saving introduced into the receipts?]—Without that saving, the plaintiffs might have sued for the full rent; the only object of inserting it was to prevent the possibility of the acceptance of the lesser rent being in any way construed to be a recognition by the plaintiffs of the lease of 1842. No consideration is stated in this alleged agreement.

They also cited *Denton v. Richmond* (*b*).

W. A. Exham replied.

Cur. ad. vult.

LEFROY, C. J., now delivered the judgment of the Court.

May 8. In this case, which comes before the Court upon a bill of exceptions, taken to the ruling of my Brother CRAMPTON, upon the trial of the case before him, an action was brought by the Corporation of Drogheda against the defendant, for the recovery of arrears of rent, which became due under a lease bearing date the 13th day of November 1820. The rent reserved by that lease was £17. 4s. 6d. late currency; but it was subsequently abated to the sum of £11. 9s. 8d. sterling; and it is for a moiety of thirteen years' arrears of this latter rent that the present action is brought. The point in this case is developed very distinctly, by the indorsement upon the summons and plaint, which states the demand of the plaintiff

(*a*) *Supra.*

(*b*) 1 Cr. & M. 734; S. C., 3 Tyrw. 630.

thus.—[His Lordship here read the indorsement above stated.]—
The credit, so proposed to be given by the particulars indorsed upon the plaint, is of the several sums of £5. 6s. Od. sterling, which were paid from 1841 to 1854, being the period during which the lease of 1842 was in dispute. The question is, whether credit is to be given for these sums as against the rent demanded, or whether, under the circumstances of the case, they are an acquittal or satisfaction of the larger sum which is now claimed? That is the precise question in the case; and, accordingly, the defence is put forward in the shape of a plea of accord and satisfaction; that these smaller sums of £5. 6s. Od., so paid *de anno in annum*, were paid and received in satisfaction of the greater rent of £11. 9s. 8d., which, if not so satisfied, is still partly due; and circumstances are set forth, introductory to this plea of accord and satisfaction, in order to lay the foundation of the proposition which is contended for on behalf of the defendant. The lease, upon which the action is brought, was made, as I have observed, in 1820. The defence states that, by a resolution of the then Corporation of Drogheda, in the year 1837, a right was given to the tenant to fine down the rent reserved by the lease under which he then held the premises, so as to reduce it to £5. 6s. Od.; and, without incumbering the case with intervening circumstances, in pursuance of that resolution, the then Corporation executed a new lease of the premises to the persons then representing that tenant, at the less rent of £5. 6s. Od., to hold, from Michaelmas 1841, for a term equivalent to the residue of the term demised by the lease of 1820; that act was done on the 15th of January 1842. The date of this new lease, and the date of the resolution upon which it was founded, are quite essential in the case. The new lease purports to be granted in consideration of a fine, and also in consideration of the surrender of the lease of 1820, upon which this action is founded. If, then, the lease of 1820 remains a surrendered lease, there would be an end to the action; and if it be not a surrendered lease, and even supposing it to continue in force, yet, if the rent claimed to be due under it has been discharged by accord and satisfaction, namely, by the payment of the less rent under the new lease, that would

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E. T. 1858. also be an answer to the action. There are two grounds, therefore,
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upon which the defendant relies—either the old lease is not in
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paid and discharged. Accordingly, the defence alleges that, from
the time of the granting of the new lease, payments were made
under it from 1841 to 1854, *de anno in annum*, of the rent of
£5. 6s 0d., thereby reserved; and it alleges further, that the payments
so made were made and received in satisfaction of the greater rent
reserved by the old lease of 1820; in other words, that the rent
of £5. 6s. 0d., paid annually under the new lease, was a satisfaction
of the rent of £11. 9s. 8d., reserved under the old lease; and, in
order to introduce matters material to the question, they say that
the Corporation repudiated the new lease during that period, and
called upon the defendants to pay the rent under the old lease,
which they refused to do, and that, that proceeding placed the
parties in a position which made it desirable that they should come
to an arrangement for their mutual accommodation, and that they did
accordingly come to an arrangement, upon the one hand to pay,
and, upon the other, to receive the less rent in discharge and
satisfaction of the greater. Now, these matters are introduced for
the obvious purpose of meeting the principle of the Common Law,
which is, that payment merely of a less sum, when it is what
we may call a parol payment or payment in fact, and not a pay-
ment in pursuance of a contract by deed, cannot, by the Common
Law, be deemed to be any satisfaction whatsoever of a greater
liquidated sum; but the law will allow the payment of a smaller
sum to be a satisfaction of a greater liquidated sum, if there be,
along with the payment of the smaller sum, any collateral advan-
tage, however small, attending the transaction. Well then, the
defence insisted upon is this:—first, that it was agreed to pay and
receive this less sum in satisfaction and discharge of the greater;
and, secondly, that there was a consideration for that agreement,
and, consequently, that the defence is good. The plaintiff's reply,
as it was important for them to do, traversing the fact that the
payments were made under any such agreement as alleged, and
saying that, although in fact payments were made, yet they were

not made or received in order to discharge or satisfy the greater rent; and accordingly, they refer to the receipts which, from time to time, were given for these several smaller sums, and which receipts they allege to be the documents containing the evidence—*E. T. 1858.
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the only evidence—of the agreement between the parties; and they insist that these documents do not furnish any evidence of an agreement to pay or receive the smaller rent in satisfaction of the greater, nor of what is material to give effect to such an agreement, if it were made in point of fact, namely, any consideration for it.

The replication goes on to show a very material ground for alleging that the lease of 1842, under which this £5. 6s. Od. is said to have been paid, was an actual nullity. In fact, from the time when it was contemplated to abolish the ancient Corporations, it was foreseen that there was great danger that, before an Act of Parliament was passed, they would proceed to make away with the corporate property from those who were to succeed them. The Act for the Regulation of Municipal Corporations in Ireland was, therefore, passed in the year 1840 (*a*); and the plaintiffs alleges that, by virtue of that Act, the lease of 1842 was null and void, being made in derogation of the rights of the succeeding Corporations. We all know that that is the effect and operation of that Act, as established by the decision of the highest tribunal, the House of Lords (*b*); and, therefore, as a consequence of that decision, it follows that the new lease, which was to have operated as a surrender of the old one, either in point of law or by express agreement, being itself null and void, the old lease was not affected thereby, but continued in force, with all the rights and incidents belonging to it. With reference to that portion of the defence, the parties did not even go to trial upon it; the nullity of the lease of 1842 was not disputed, and all the issues went to the other defence, namely, the satisfaction of the rent. We may, therefore, take it for granted, that the new lease, so far as the question of its existence may be important with respect to the satisfaction of the rent, was a perfect nullity. Well, then we come to the traverse of the agreement between the parties—the one to pay and the other

(*a*) 3 & 4 Vic., c. 108.

(*b*) See 5 H. L. Cas. 460.

E. T. 1858. to receive the several payments made under the lease of 1842, in *Queen's Bench* satisfaction of the rent reserved by the lease of 1820. The plaintiffs, in their replication, refer to the documents which, they state, contain all the elements from which alone could be established the fact of an agreement, or of the consideration for an agreement, to accept the less sum in satisfaction of the greater. "And they further say, that the only terms upon which the plaintiffs received the moneys, called in the said defence the said lesser rent, were and are expressed in written receipts, not under seal, passed and given by the plaintiffs on the occasion of the said respective payments; and that the same were and are the only writings in that behalf, and are in the words and figures following."—[His Lordship here read the form of receipt set forth in the replication.]—Now, it is perfectly plain, therefore, that the rent was, in point of fact, paid *prima facie* on account of the lease which has been held to be void. There is no reference in the receipt to the original lease, or to the rent reserved by it. There is no agreement whatsoever in terms—not the semblance of an agreement—even of a verbal or parol agreement, in point of fact, that the less rent should be taken and received, or that it was to be in satisfaction of the greater rent. It is called "rent due." What was the "rent due?" It was the rent under the lease which has since been adjudged to be void. Thus, then, by the express document itself, the rent is paid on foot of the new lease. There is not an intimation that it was paid in reference to any other lease; for no other lease is mentioned; on the contrary, the proviso in the receipt is, that the receipt of that rent shall not prejudice the rights of the present Corporation, that, in fact, it should not be taken as any confirmation of the new lease, but that the plaintiffs were to be at liberty to get rid of that lease as best they could. That lease was decided by the House of Lords to have been a nullity; and thus the proceedings to get rid of it were authorised by these very documents. Now, there was no surrender, in point of law, of the lease of 1820, because the lease of 1842, being itself void, did not operate as any surrender of the old lease; and I should like to know, when the Corporation got rid of the new lease, what was to pre-

vent them, without any proviso or reservation whatsoever in these receipts, reverting to the old lease? But here we have, *ex abundanti cautela*, a proviso inserted, lest, by any possibility, the receipt of that rent should be construed in any manner as a confirmation of the new lease; and this is demonstration plain that the rent was not paid on foot of the old lease, because the proviso is, that the receipt of that rent should not preclude the Corporation from impeaching the title under which the defendants claimed to hold the premises out of which the rent had accrued due, and should not give validity to the new lease. Upon the face of these receipts, therefore, and by their express terms, it is impossible to make out that the payments were made or received in satisfaction of the rent reserved by the old lease. But independently of these receipts being utterly defective to establish such an agreement, we cannot make a contract for the parties, where they have made one so clearly for themselves; nor can we, either in Law or in common sense, construe them in violation of the plain meaning appearing upon the face of them. There is nothing, therefore, to warrant the allegation, that these sums were paid or received in satisfaction of the greater rent. But, I must further observe, what is the consideration which the Corporation received for this agreement? They received a less rent; but, upon the other hand, the tenant was allowed to keep in his pocket the balance of the greater rent. The arrangement may have been for their mutual advantage; but unquestionably no peculiar advantage whatsoever resulted to the Corporation. There is no consideration for this alleged agreement; and even if there were a consideration—if a consideration could have been worked out of the circumstances, that consideration should have appeared upon the face of the agreement; for the rule of law is inflexible, that the consideration for an agreement must appear upon the face of the agreement, either expressly or by necessary inference, wherever, under the Statute of Frauds, an agreement is required to be in writing. Now, there is no consideration here, express or implied. The Corporation, it is said, was to be at liberty to impeach the new lease; but they did not require a reservation for that purpose; the law gave them all they could

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E. T. 1858. desire; the law which annulled all acts done by the former Corporation after a particular period (during which period the lease of 1842 was made) also rendered that lease a nullity, and deprived it of any existence capable of confirmation. There is, therefore, an utter failure both of evidence of the contract, and also of evidence of the consideration for it, to remove the rule of the Common Law, that payment of a less sum cannot be a satisfaction of a greater liquidated sum, unless there is some further advantage accompanying the payment, and that advantage must be a reasonable one, and must appear upon the face of the agreement.

Upon the whole case, therefore, it appears to us clear that the learned Judge was perfectly right in refusing to direct the jury, that these receipts were evidence to establish this defence. We must overrule the exceptions, and give judgment for the plaintiff.

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THIS was an application on the part of the defendants, two of the Justices of the Peace for the Queen's County, that the proceedings in this action might be set aside, upon the ground that same was brought for acts done under a conviction which had not been quashed, and in contravention of the provisions of the statute 12 Vic., c. 16; or in case the Court should not set aside the proceedings, that the second and third counts might be struck out, as being mere repetitions of the first, and that the fourth count might be set aside as embarrassing.

The summons and plaint contained four counts; and the first count complained "That the defendants, to wit on the 15th day of August in the year of our Lord 1857, at Abbeyleix in the Queen's County, caused an assault to be made on the said James Lalor, the plaintiff, and caused the said plaintiff to be unlawfully apprehended and taken to prison, and the defendants unlawfully

In an action against two Justices, the three first counts of the summons and plaint stated a cause of action in trespass for an illegal conviction at Petty Sessions. The plaintiff had been imprisoned for three weeks by an order of the defendants; and the conviction, which was made, as alleged, without jurisdiction, but appeared regular upon the face of it, having been removed by *certiorari*.

into the Court of Queen's Bench, it was, upon argument, affirmed.—*Held*, that the conviction was one which might be quashed upon application to the Court of Queen's Bench, within the meaning of the 2nd section of the 12 Vic., c. 16 (Protection of Justices Act), and that the three first counts should be set aside under the 7th section of that Act.

The fourth count complained that the defendants, unlawfully, maliciously and without any reasonable or probable cause, convicted and imprisoned the plaintiff, &c., although the defendants had not any jurisdiction to make said conviction or order, and although no complaint had been made against, or summons served upon the plaintiff.—*Held*, assuming that the fourth count stated a cause of action within the 1st section of the 12 Vic., c. 16, that it could not be set aside under the 7th section.

The proviso in the 2nd section of the 12 Vic., c. 16, applies only to the class of actions mentioned in that section.

Held also, per PIGOT, C. B., and PENNEFATHER and GREENE, BB., that the fourth count ought to be set aside as embarrassing.

Held, per RICHARDS, B., that the fourth count was a count in trespass, and ought to be set aside, under the 7th section.

In this case the Court (RICHARDS, B., dissentient upon this point) set aside the plaint only, and allowed the writ to stand as a summons, more than six months having elapsed since the conviction.

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BLAND. The second and third counts merely varied the statement of the cause of action disclosed by the first. The fourth count was as follows:—"For that the defendants, being two of the Justices "of the Peace of the Queen's County, on the 15th day of August "1857, at Abbeyleix, in the Queen's County, unlawfully, maliciously "and without any reasonable or probable cause, convicted the said "plaintiff of having assaulted and used threatening and abusive "language towards William Case and Richard Carter, and then un- "lawfully, maliciously and without any reasonable or probable cause, "ordered the said plaintiff to be imprisoned for three weeks, for "having committed said alleged assault, and used said alleged "language, and then unlawfully, maliciously, and without any "reasonable or probable cause, caused the said plaintiff to be "imprisoned for three weeks in the gaol of Maryborough ; whereby "the plaintiff was imprisoned for three weeks in the gaol of Mary- "borough, in the Queen's County, although the defendants had not "any jurisdiction to make such conviction or order; and although "neither the said William Case nor the said Richard Carter made "any complaint against the said plaintiff, nor was the plaintiff ever "served with any summons requiring him to appear and answer to "any complaint of the said William Case or Richard Carter, nor "did the said William Case or Richard Carter ever issue, or cause "to be issued, any summons requiring the plaintiff to appear and "answer any complaint." It appeared, from the affidavits grounding the motion, that on the 21st of July 1857, an assault had been committed, near the town of Abbeyleix, by E. Phelan upon W. Case and R. Carter. For this assault E. Phelan was summoned, and J. Lalor, the plaintiff, was summoned to appear as a witness at the trial. On the 15th of August 1857, the case came on for trial at the Petty Sessions at Abbeyleix, before the defendants, Loftus H. Bland and Thomas Doxey, two of the Justices of the Peace for the Queen's County. W. Case proved the assault made by Phelan, and he, being called on for his defence, offered to produce the plaintiff as a witness, and thereupon the plaintiff's name was entered in the Petty Sessions book by Mr. Bland as a witness.

At this stage of the proceedings, intimation was given to the Magistrates that the plaintiff was in fact implicated in the assault complained of, and accordingly Mr. Bland erased the plaintiff's name from the column of witnesses in the Petty Sessions book, and inserted it in the column for defendants, and informed the plaintiff that he was about to be tried for an assault upon W. Case. Lalor made no objection at the time, and the case having been gone into, the Magistrates, considering the assault proved, sentenced the plaintiff to three weeks imprisonment.

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On the 23rd of November 1857, the plaintiff obtained a conditional order from the Court of Queen's Bench, to bring up this conviction, that same might be quashed; and the grounds stated in the conditional order were the want of jurisdiction in the Justices, inasmuch as the conviction had been made without any summons issued, or complaint made against the plaintiff. On the 14th of January 1858, the conditional order was made absolute, notwithstanding cause shown; and the conviction having been accordingly removed into the Court of Queen's Bench, it appeared, when examined, regular upon the face of it. The case was then re-discussed upon a motion to quash the conviction; and upon the 30th of January 1858, an order was made, simply affirming the conviction. No reasons were given by the Judges for their decision. The present action was then brought.

J. T. Ball (with him *J. E. Walsh*), in support of the application.

This case may be considered separately as to the three first counts of the summons and plaint, which clearly state a cause of action in trespass, for acts done by the Magistrates without jurisdiction. The question then is, is this action one forbidden to be brought, by the 2nd section of 12 *Vic.*, c. 16? for, if it is, the proceedings ought to be set aside under the 7th section. It plainly is, for the conviction quarrelled with might have been quashed upon application to the Court of Queen's Bench. A *certiorari* was granted by that Court, which shows they thought they had a jurisdiction to investigate the matter, and, having investigated it, they deliberately affirmed the conviction. The object of the

E. T. 1858. Protection of Justices Act was, that while a conviction remained Exchequer. unreversed, the Magistrate should not be harassed by an action for acts done under it. With respect to the fourth count, supposing that it states a cause of action within the 1st section, it ought to be set aside under the 7th. The proviso in the 2nd section applies to the actions mentioned in the 1st. There is nothing in the Act to limit its application, and the policy of the Legislature as to both classes of action is the same. At all events, the count is embarrassing, for it is difficult to say whether it is a count in trespass or in case.

F. Macdonogh and D. C. Heron, contra.

The proviso in the 2nd section has no application. The conviction could not have been quashed upon appeal; for the 14 & 15 Vic., c. 92, under which the conviction was made, enacts in its 23rd section that an appeal shall lie only where the term of imprisonment awarded exceeds one month. In this case the imprisonment was only for three weeks. Again, it could not be quashed upon application to the Court of Queen's Bench. The 24th section of the 14 & 15 Vic., c. 92, takes away the *certiorari* in the case of orders made under that Act. It is true we got in this very case an order for a *certiorari* from the Court of Queen's Bench; but it was upon the ground that this was an exceptional case, like those cases in which the proceedings have been *coram non Judice*, or in which one of the Magistrates was interested in the subject-matter of decision: *Regina v. Massey* (a); *Regina v. Justices of Cork* (b); *Regina v. Campbell* (c). But when the conviction was brought up it appeared the power of the Queen's Bench to quash it was frustrated, for the Magistrates returned a conviction regular upon the face of it, reciting a complaint, and the Court could not receive evidence of matters which would contradict the record before them: *Regina v. Bolton* (d); *Weaver v. Price* (e); *Durrant v. Boys* (f);

(a) 7 Ir. Com. Law Rep. 211. (b) 7 Ir. Com. Law Rep. 244.

(c) 3 Ir. Com. Law Rep. 586. (d) 1 Q. B. 66.

(e) 3 B. & Ad. 409. (f) 6 T. R. 580.

Regina v. Deny (a). For that reason the conviction was affirmed, E. T. 1858.
 and it is therefore one which cannot be quashed, within the meaning
 of the Act. With regard to the fourth count, it is quite clear the
 proviso in the 2nd section has no application to the class of actions
 mentioned in the 1st, within which the count ranges. The words
 "such actions" in the proviso refer, according to the ordinary rule,
 to the last antecedent. There is a plain distinction taken by the
 Act between case and trespass; and it never could have been
 intended by the Legislature, that a Magistrate, who acted maliciously
 and without probable cause, should be protected from an action, if
 the act were done under the colour of jurisdiction.

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J. E. Walsh, in reply.

It is well settled that the want or excess of jurisdiction on the part of Magistrates is examinable upon affidavits, and the Court above will not be concluded by the record before them: *Regina v. Bolton*; and therefore the conviction, as returned, was not conclusive upon the Court. The real reason for the affirmance of the conviction was that they considered the complaint made before the Magistrates sufficient, upon a consideration of the case of *Ex parte Hopwood (b)*. The three first counts, therefore, must be set aside. The fourth count is also a count in trespass, for the words "maliciously and without probable cause" are only matter of aggravation; even if it were a count in case, it is controlled by the proviso in the 2nd section.

Pigot, C. B.

This is a motion to set aside the proceedings in the action, as brought in contravention of the 12 & 13 Vic., c. 16, ss. 1, 2 & 7; or to alter the summons and plaint, as embarrassing and tending to prevent a fair trial of the cause.

The English statute 11 & 12 Vic., c. 44, passed in 1848, contains provisions similar to those of the 12 & 13 Vic., c. 16, with which we have now to deal. The first of those statutes was passed nearly ten, and the other nearly nine years ago. I have not been able to find

(a) 2 Lownd., M. & P. 230. (b) 4 New Sess. Cas. 174.

- E. T. 1858.** any notice, in any report or text-book, of a motion similar to the
Exchequer. present, under either of those Acts of Parliament. When we are
LALOR dealing with such an application, apparently made for the first time,
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stated and fully understood.

The motion is made under the 7th section of the statute, which provides, "That in all cases where by this Act it is enacted that no action shall be brought under particular circumstances, if any such action shall be brought, it shall be lawful for a Judge of the Court in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the proceedings in such action, with or without costs, as to him shall seem meet."

By the 1st section it is enacted, "That every action hereafter to be brought against any Justice of the Peace in Ireland, in any of her Majesty's Superior Courts of Law at Dublin, for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

By the 2nd section it is enacted, "That for any act done by a Justice of the Peace, in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such Justice in such matter, may maintain an action against such Justice, in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause: provided, nevertheless, that (in any case where a conviction may be quashed, either upon appeal or upon application to her Majesty's Court of Queen's Bench),

" no such action shall be brought for anything done under such conviction or order, until after such conviction or order shall have been quashed, either upon appeal or upon application to her Majesty's Court of Queen's Bench."

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Of the three first paragraphs or counts of the summons and plaint, the first complains of an assault and false imprisonment; the second and third complain of an arrest and imprisonment. The fourth complains that the defendants, being Magistrates, unlawfully, maliciously and without reasonable or probable cause, convicted the plaintiff of having assaulted and having used threatening and abusive language towards William Case and Richard Carter, and unlawfully, maliciously and without reasonable or probable cause, ordered the plaintiff to be imprisoned for three weeks for committing such assault and using such language; and then unlawfully, maliciously and without reasonable or probable cause, caused the plaintiff to be imprisoned for three weeks in the county gaol, whereby the plaintiff was imprisoned for three weeks in the county gaol. The count then proceeds to allege that this was done although the defendants had not any jurisdiction to make the conviction or order, and although neither Case nor Carter made any complaint against the plaintiff, nor was plaintiff ever served with any summons, nor did Case or Carter ever cause any summons to be issued, requiring the plaintiff to appear and answer any complaint.

The defendants, by the present motion, seek to set aside the whole summons and plaint, on the ground that the action is brought against the defendants for having made an illegal conviction as Magistrates, and for acts done under that conviction; although the conviction has not been quashed on appeal or by the Court of Queen's Bench: and they contend that the proviso in the 2nd section of the 12 & 13 Vic., c. 16, and the 7th section of the same Act, apply to all the counts of the summons and plaint. Further, if those sections do not apply to the fourth count, the defendants seek to set aside that count as embarrassing, under the 83rd section of the Common Law Procedure Act of 1853, 16 and 17 Vic., c. 113.

E. T. 1858. The case has been argued, and, in my opinion, ought to be considered, separately in reference to the three first counts, and in reference to the fourth count of the summons and plaint.

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The three first counts complain of a trespass to the plaintiff's person. It is admitted, in the case made by the plaintiff's affidavits, and has been admitted by his Counsel at the Bar, that the way in which it is intended to sustain these three first counts is, by proving in fact, and insisting in law, that the plaintiff was imprisoned under a conviction made by the defendants, who are Magistrates, without or in excess of jurisdiction. This admission brings the case, as to those three counts, clearly within the proviso of the 2nd section. That section saves the right to proceed, in the same manner as before the statute was passed, for any act done by a Justice of the Peace, in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, and saves the right so to proceed, for any party injured by any such act, or by any act done under any conviction, or order made or warrant issued, by such Justice in such matter; and the party so injured may so proceed, without making any allegation that the act was done maliciously, or without reasonable and probable cause; but when the act complained of is an act done *under such conviction or order*, and when the conviction *may* be quashed, either upon appeal or upon application to the Court of Queen's Bench, the 2nd section provides that no such action shall be brought until the conviction or order shall have been quashed, either upon appeal, or upon application to the Court of Queen's Bench. In the present case, the conviction not only was not quashed, but it was (so far as we can judge from the form of the order of that Court produced before us) confirmed, upon application to the Court of Queen's Bench. In order to show that the 2nd section did not apply, the plaintiff's Counsel contended, first, that, under the 14 & 15 Vic., c. 92, s. 23, the conviction relied on could not have been quashed upon appeal, the imprisonment awarded by the conviction being for three weeks only; and that section allowing an appeal, in the case of such a conviction as this, only where the period of imprisonment exceeds one month: and such, I think, is the effect of the 23rd section

of the 14 & 15 Vic., c. 92. Secondly, the plaintiff's Counsel argued that the jurisdiction of the Court of Queen's Bench to review the conviction by *certiorari* is taken away (as it is in express terms) by the 24th section of the 14 & 15 Vic., c. 92; and that the general jurisdiction of the Court of Queen's Bench to quash the conviction, if made without jurisdiction, was frustrated and taken away by the return made, in this very case, to a *certiorari* which issued from the Court of Queen's Bench, and which return in effect stated (and, as the plaintiff alleges, contrary to the fact) that a complaint was made by Case and Carter, and that upon such complaint the plaintiff was convicted. The plaintiff's Counsel argued that this return was conclusive upon the Court of Queen's Bench, as to the fact that a complaint was made; and that, since the making of the complaint must be taken, upon the return, as showing jurisdiction, it was not competent to the Court of Queen's Bench to examine further as to that matter, and consequently the conviction was not one which "may be quashed on application to Her Majesty's Court of Queen's Bench." In my opinion this argument is wholly untenable. Enactments taking away the right to remove or to review a conviction or order of Justices by *certiorari* have been constantly held by the Court of Queen's Bench only to apply to cases in which the Justices act within their jurisdiction, and not to affect the general controlling power which the Court of Queen's Bench possesses to examine and to quash proceedings had without any jurisdiction or authority of law. In this very case, the Court of Queen's Bench have acted in the exercise of that superintending and controlling power, with which, for purposes as necessary as they are just and wise, that Court is invested, and which it has exercised from the earliest times. A *certiorari* issued in this case, not for the purpose of reviewing the decision of the Magistrates; for that, under the 14 & 15 Vic., c. 92, s. 24, the Court of Queen's Bench, or any other Court, had no power to do, but for the purpose of examining into what was done, with a view to determine whether the Magistrates acted without jurisdiction. If they did, the proceeding was not one made under the statute, and, consequently, was not protected from being annulled by the 24th section. We have no report of the grounds

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E. T. 1858. on which the Court of Queen's Bench ultimately determined the case upon the return to the *certiorari*; but we must assume that they would not have affirmed the conviction unless, upon a deliberate review of all the materials for decision, including the conviction as well as the affidavits, they determined that the conviction was a matter within their jurisdiction, to be quashed, if made without lawful authority—to be treated, and, if necessary, declared valid, if made within the lawful powers of the Magistrates.

That the Court of Queen's Bench is not concluded upon the question whether the Magistrates had jurisdiction to entertain the cause, by the return of the Magistrates, or by the statements contained in the proceedings complained of, is clearly laid down in *The Queen v. Bolton* (a). Lord Denman (p. 72) says:—“Where the charge laid before the Magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us; or if, the charge being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us, by affidavits, what the real charge was, and that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has been presented to the Magistrate, over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. But, as in this latter case, we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them.” That was a case in which the right to review the decision by *certiorari* was not taken away by an Act of Parliament. In the case of *The Queen v. Deny* (b), the Court had to deal with a summary conviction for an assault, under the 9 G. 4, c. 31, s. 27. The 36th section of that statute expressly provides that, “No such conviction shall be quashed for want of form, or be removed by

"*certiorari* or otherwise into any of His Majesty's Courts of Record." E. T. 1858.
Mr. Justice Erle, before whom an application was made for a *certiorari*, made absolute the rule for the writ to issue, on affidavits showing that the summary conviction for an assault was made not upon a complaint of an assault, but upon an information for sureties to keep the peace was beyond their jurisdiction. These cases were both cited at the Bar. In a more recent case, *The Queen v. Badger* (a), an order was made for the issuing of a *certiorari*, on the ground that there was an excess of jurisdiction, although the power to review the judgment of Justices by *certiorari* was taken away by the statute. The return there stated all the proceedings; and therefore the ultimate decision, by which the majority of the Court held that there was an excess of jurisdiction, and, on that ground, quashed the order, was not made on affidavits contradicting the return. The question there was whether, in a complaint against a surveyor for extortion, the complainant stated a matter of complaint, over which the Justices had jurisdiction? Lord Campbell was of opinion that it did; the other Judges held that it did not; and the Court accordingly quashed the order. Lord Campbell held that the information, stated in the return to the *certiorari*, contained enough to enable the Court to determine that it contained a complaint which gave jurisdiction, citing the passage in Lord Denman's judgment in *The Queen v. Bolton*, to which I have referred, but holding that, as it was not alleged that there was any mis-statement of the proceedings, the affidavits of what passed before the Magistrates ought not to be referred to; the decision of the Magistrates, if they had jurisdiction to enter on the complaint, being final. The other Judges referred to the affidavits for the purpose of ascertaining and explaining what was the complaint in fact made and relied on by the complainant; but no doubt was suggested that, notwithstanding what appeared in the proceedings and return, it was competent to the party objecting to the order to prove, by external evidence, if that evidence was necessary, that the inquiry was undertaken without jurisdiction. It appears to me, therefore, impossible to maintain that this was not a conviction which it was

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(a) 6 Ell. & Black. 154.

E. T. 1858. competent to the Court of Queen's Bench to quash, on application to them, for want of jurisdiction in the Magistrates to make it; and, if so, the case is plainly one in which the Magistrates are protected by the 2nd section and its proviso. The manifest object of that section was, that the want or excess of jurisdiction shall not be made the ground of an action against the Magistrates for an act done under a conviction, so long as the conviction remains unreversed by the tribunal having authority to quash it, namely, the appellate Court, if an appeal be given, or the Court of Queen's Bench, acting within its controlling authority over Inferior Courts.

The case being, then, as to the three first counts, plainly within the prohibitory proviso of the 2nd section, we have to determine whether we ought to set the counts aside under the 7th section. It has not been contended by the defendants upon this motion that, if the proviso of the 2nd section applies, the 7th section also is not applicable. It is singular that no report should, as I have said, exist (at least I have not been able to find any), of an application to set aside proceedings under that section, or under the corresponding section of the English statute. So far, therefore, this motion is of the first impression. I can very well understand why this has occurred. The jurisdiction is given to a single Judge. In England it has probably been exercised by a Judge in Chamber; and applications of this kind have probably been complied with only in cases so clear that the question has not been raised, whether the decision of the Judge should be reviewed by the Court? There are several sections of the Act directing that no action shall be brought under the circumstances mentioned in them. In many instances it would be found very difficult to apply satisfactorily the summary jurisdiction of defeating an action, conferred by the 7th section. For instance, by the 4th section it is enacted, "That where any poor-rate shall be made, allowed and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the Justice or Justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and that in all cases where a disre-

"tionary power shall be given to a Justice of the Peace, by any E. T. 1858.
"Act or Acts of Parliament, no action shall be brought against *Erregeuer.*
"such Justice for or by reason of the manner in which he shall
"have exercised his discretion in the execution of any such power."

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Whether an action is or is not brought under the circumstances mentioned in that section—whether an Act of Parliament does or does not confer a discretionary power—whether the case in question (depending as it may on complex and litigated facts) is within the Act of Parliament at all; if it be, then whether it is within the discretionary power—whether the discretionary power has in fact been exercised, and whether the action can only be maintained by a complaint of the manner in which the Magistrate has exercised the discretionary power—these are questions in which it must, in many cases, be most difficult, and in some nearly, if not altogether, impossible to deal on motion, and upon the evidence supplied by conflicting affidavits. It is probable that this difficulty prevented applications of this nature from forming part of the ordinary business of the Courts in which decisions are reported; and in some of the cases which have been brought to trial, and on which the Courts have adjudicated, the defence which succeeded at the trial was expressly founded on the 2nd section of the statute. In my opinion, the jurisdiction conferred on us by the 7th section is one which, when the case is plain and clear, we ought to exercise in furtherance of the protection which it was the declared purpose of the Legislature to afford to Magistrates, and indeed, in mercy to both parties; for it will be only stopping in the commencement an action which, if it proceeds, must ultimately fail. But I am also of opinion that we ought not to exercise this jurisdiction, on conflicting affidavits, and in a case in which we are not clearly satisfied we shall be right in our decision; recollecting that from our order, setting aside the proceedings, there is no appeal; that in many cases it will be final, because (as in the case now before us) it will be too late to bring an action in another Court; while our refusal to interfere will not preclude the defendant, who may rely, in defence to the action, on the same ground on which he seeks to set aside the proceedings.

E. T. 1858. In the present instance, I am of opinion that a clear case is made out, upon the admissions of the plaintiff himself, under the 2nd and 7th sections, to set aside the proceedings, so far as relates to the three first counts.

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In support of that part of the motion which seeks to set aside the rest of the summons and plaint (that is, the fourth count), the defendants' Counsel contended first that, assuming that the fourth count was so framed as to state a cause of action within the 1st section of the 12 & 13 Vic., c. 16, the protecting proviso of the 2nd section applied to it, as well as to an action within the 2nd section ; and that, as the conviction had not been quashed, the proviso, and therefore the 7th section, applied. Secondly ; the defendants' Counsel insisted that the fourth count, as well as each of the three first, stated a cause of action which was founded on the acts of the defendants, in making and causing to be executed a conviction without jurisdiction, and in effect complained of a trespass, and therefore that the fourth count, the conviction not having been quashed, was within the 2nd section and its proviso.

The first of these questions led to a considerable discussion, which, I must say, I think the Court might have been spared. The two analogous sections (1st and 2nd) of the English statute have repeatedly been the subject of consideration, not upon motions such as this, but upon solemn arguments, in which the Court had to determine the law, on conditional orders for new trials, and on points reserved : not one of those cases was adverted to in the argument by Counsel at either side. In several of them the Courts have expressly treated the proviso in the 2nd section as applying to the action mentioned in that section only ; namely, an action "for any act done by a Justice of the Peace in a matter of which, "by law, he has no jurisdiction, or in which he shall have exceeded "his jurisdiction." Independently of any authority, I should, as I mentioned in the course of the argument, construe the words "such action," in the proviso of the 2nd section, by applying a very ordinary rule of construction, namely, by referring them to the last antecedent ; that is, to the "action" which the previous part of the same section describes : and I should so refer those words for this

additional reason, that the 1st section plainly includes the case of a proceeding legal on the face of it, done within the jurisdiction of the Magistrate, and not liable to be quashed either on appeal or by *certiorari*, but done maliciously and without probable cause. It would be absurd in itself, and would plainly frustrate the 1st section, to enact, in the 2nd, that the 1st should not apply, except where the conviction or order should have been quashed on *certiorari* or on appeal. That, in truth, would be tantamount to giving immunity to any exercise of jurisdiction of a Magistrate, however malicious, and however destitute of reasonable or probable cause, provided it were technically conducted in due form of law—the very misconduct which was plainly provided for in the 1st section.

This view of the 2nd section and its proviso is sustained by the language used by the Judges in several cases in which the corresponding sections of the English statute have been under consideration; not, indeed, adjudicating upon the point, for the construction now contended for by the defendant was never suggested; but treating the proviso of the 2nd section as applying only to the actions mentioned in the previous part of that section. In *The Queen v. Wood* (a), one of the cases in which the Court of Queen's Bench quashed the conviction on *certiorari*, on the ground that it was made without jurisdiction, although the *certiorari* was taken away by statute for acts done under it, in the course of the argument it was urged, against the application to quash the conviction, that the proper way of raising the question would be by an action of trespass. Mr. Justice Erle (p. 52) answered this argument by saying, "Such an action, if the proceeding were within the Magistrates' jurisdiction, would not lie by the statute 11 & 12 Vic., c. 44, s. 1. "If it did lie, it would not show that this conviction could not be quashed." In a subsequent stage of the case (p. 58), Lord Campbell deals with the same argument in these words:—"That" (the bringing of an action) "could not be done until the conviction was quashed, statute 11 & 12 Vic., c. 44, s. 2, if the complaint was only want of jurisdiction." The same view of the statute appears, I think, to have been taken in *Barton v. Bricknell* (b), by Mr.

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E. T. 1858. Justice Coleridge (p. 396) and by Mr. Justice Wightman (p. 397); and in *Leary v. Patrick* (*a*), by Lord Campbell (p. 272), and by Mr. Justice Coleridge (p. 273); and in the case of *Kendall v. Wilkinson* (*b*), Mr. Justice Coleridge (who, with Mr. Justice Wightman, was of opinion that in that case an action of trespass would not lie, because the Magistrates were acting within their jurisdiction in issuing the warrant complained of) intimated his opinion that if there were malice, and a want of probable cause, an action on the case would have been sustainable. In that case, the order on which the warrant issued had not been quashed.

But the defendants further insist that, although the 2nd section be confined to actions mentioned in that section, and founded on an alleged want or excess of jurisdiction, yet the fourth count is so framed as to be within that class of actions; that it, in effect, relies upon an alleged act of trespass, done without jurisdiction, and that on that ground it ought to be set aside. The plaintiff, on the other hand, insists that the fourth count complains of an exercise of the powers of the Magistrates, applied maliciously and without reasonable and probable cause; and that it is within the 1st section of the statute, which expressly gives (or rather saves) the plaintiff's right to maintain an action on that ground.

The fourth count does undoubtedly state that the defendants made a conviction; that they issued a warrant upon it; that they caused the plaintiff to be arrested and imprisoned under that warrant; and that all this was done maliciously and without reasonable or probable cause. So far, the count states the malicious exercise of jurisdiction, without reasonable or probable cause, as the *gravamen* of the action in this count, and the imprisonment as the injury sustained. So far, the count states a cause of action for which the plaintiff is entitled to sue, within the 1st section of the statute; and so far, under the old forms, the count would be framed as in an action on the case. The count, however, proceeds to state that the defendant had not any jurisdiction to make the conviction, and that neither William Case nor Richard Carter made any complaint against him, nor was he once served with any summons requiring

him to appear and answer: and what we have to determine, upon this part of the motion, is, whether those latter averments make the count, which would otherwise be within the 1st section, a count not within the 1st, but within the 2nd? Now, in the first place, it appears to me that if any allegation of this count were traversed, or if there were a cumulative denial of them all, and if (the action having gone to trial) the plaintiff should prove that the proceeding of the defendants was malicious and without reasonable or probable cause, he would be entitled to succeed in the action. The addition of the other averments, even if the 2nd section of the statute had not been passed, would in that case become unnecessary. Indeed the falsification of those averments would only tend to establish the cause of action stated in the other part of the count; because it would show a proceeding done *with jurisdiction*, but actionable because done with malice and without probable cause. Before the Common Law Procedure Act, and upon ordinary principles of pleading and evidence, it was always held, both in reference to declarations and to pleas, that where there was not an objection on the ground of variance, averments were distributable; and however the pleading might have been objected to on demurrer, on the ground that it was ambiguous or was framed in the alternative, it was sufficient to prove on the trial those averments which showed a cause of action, or a defence. For instance, in an action for a false return of *nulla bona* to a *fi. fa.* against the goods of two, if it were alleged in the declaration that they both had goods in the Sheriff's bailiwick, it would be enough to prove that either of them had such goods: *Jones v. Clayton* (a). So, to support a plea of justification in trespass, containing several averments, it was only necessary to prove such as constituted a sufficient defence to the action. A great number of cases illustrating the mode in which redundant statements have been dealt with on trials will be found in 1 *Taylor on Evidence*, pp. 210-224. Further, upon the facts before us, and under the 2nd section of the statute with which we are dealing, the plaintiff could not rely upon the averments alleging the want of jurisdiction; for the very fact of the conviction, on

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E. T. 1858. which he relies in the former part of the count, remaining, as it does,
Exchequer. unquashed, must render the averments in the latter part of it wholly
LALOR nugatory and inoperative. Upon proof of the conviction, unannulled,
v. those averments must become, in effect, mere surplusage at the
BLAND. trial. In this view, there would be great reason for contending
that the count which we are called upon to set aside as within the
2nd section is one which could not be sustained as a count within
that section, but is one which, containing all the averments to make
it a count within the 1st section, might be sustained at the trial,
within that 1st section, and under the parliamentary right which
that section saves, if it does not confer.

In terms, indeed, the fourth count is *not* exactly in the form
which the 2nd section describes. The action there described as that
which the plaintiff may bring for an act done under a conviction made
without jurisdiction is, "an action in the same form and in the same
"case as he might have done before the passing of this Act, without
"making any allegation in his declaration that the act complained
"of was done maliciously, and without reasonable or probable
"cause." This count contains that allegation.

On the whole, I am not quite prepared to hold that this count, which
contains all the statements sufficient to show a cause of action for
which the 1st section expressly declares the plaintiff's right to sue,
ought to be set aside, under the 7th section, because it also contains
averments which, if the other statements did not bring it within the
1st section, would have brought it within the 2nd. It appears to me
to be framed in such a manner, that if, in a declaration according
to the old forms, it had been joined with counts in case, and there
were a general demurrer to the declaration for misjoinder, and that
were the only objection, there would be strong ground for holding
that it was an informal count in case, resting the plaintiff's com-
plaint upon a conviction made maliciously and without reasonable
or probable cause, but not suing upon the acts done as acts of
trespass. I need not refer here to the instances in which the
party had, upon the same state of facts, his election to bring case
or trespass.

It is unnecessary, as I view this case, to decide whether the fourth

count ought to be retained, as within the 1st section of the statute, or to be aside, as within the 2nd; because I am clearly of opinion, on other grounds, that this count cannot be permitted to stand. In my judgment, it must be either amended or wholly set aside, as most embarrassing to the defendant, under the jurisdiction which we are in the daily habit of exercising, in pursuance of the Common Law Procedure Act, and which, in a part of the present notice of motion, we are called upon now to exercise, in reference to this count. Whether by accident or by design, the count is so framed as to afford to the plaintiff the opportunity of arguing at the trial that he may select, for proof, either set of averments; and it not only exposes the defendants, by this ambiguity, to difficulty and embarrassment in dealing with these defences, either in pleading or in evidence, but it creates the further embarrassment of raising a litigated and doubtful question upon this very motion, to which the defendants were entitled to resort, as one mode of defence to the action given to them by the Act of Parliament. The difficulty which the frame of the count presents, in determining whether it is or is not a count within the 2nd section, or is to be treated as a count within the 1st, is in itself a reason for not permitting it to stand. I am therefore of opinion that we ought either to compel the plaintiff to amend this count, by confining it to the matter authorised by the 1st section, or to set it aside altogether, giving to the plaintiff liberty to amend, by introducing a new count, properly framed. The effect of this would be, to remove the whole statement of the cause of action; that is, to set aside so much of the summons and plaint as comprises the plaint, but to leave the count unaffected, so far as it operates as a summons, and to allow it to be amended, by stating a cause of action in conformity with the 1st section of the Act. I do not think we ought to set aside altogether the writ of summons and plaint; such a course would be in effect not merely to relieve the plaintiff from an improper form of procedure, which is the object of the 2nd and 7th sections of the statute, but wholly to bar the plaintiff from taking any proceeding in a case in which he was plainly entitled, when he served this summons and plaint, to proceed under the 1st section.

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E. T. 1858. The transaction complained of having taken place in August 1857,
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BLAND. to set aside the writ would be to give to the defendant a conclusive bar to a new action under the 8th section, which disables a plaintiff from suing after the expiration of six months from the act complained of. To do this, I think, would be an exercise of jurisdiction beyond the necessity of the occasion, and beyond the benefit and protection which the statute confers on the defendants. That benefit and protection will be amply secured, by freeing them from the necessity of defending any other action than that which the statute expressly authorises the plaintiff to bring. We ought not to be influenced by any consideration of the supposed hardship of bringing this action, on the one side, or of what the plaintiff complains of, on the other; we are not in a condition, on this motion, to determine whether this action ought or ought not to have been commenced, or ought or ought not to be prosecuted. Aloof from the angry contentions of parties at both sides, and exercising the jurisdiction reposed in the Court, with the temper and discretion which ought to govern it, we ought not to preclude the suitor from prosecuting his suit, even if we should imagine that his proceeding was ill-advised. That is a matter on which we have not to adjudicate on this motion, which deals with procedure and not with merits. We should simply provide, by our order, first, that the defendants shall have the full protection which the statute confers; and, secondly, that the plaintiff shall be abridged of no privilege of suit of which it is not necessary, for giving that protection, to deprive him.

Something was said of a difference between the 2nd section of the 12 *Vic.*, c. 16, and the corresponding section of the 11 & 12 *Vic.*, c. 44. The only differences are, that the word "any" is inserted before "such;" that the words "or order" are inserted after the word "conviction," when that word appears a second time in the same member of the sentence; and that the prohibition to bring an action for anything done under a conviction or order, where there is a want or excess of jurisdiction, until the conviction or order shall be quashed, is, in terms, confined to "any case where a conviction may be quashed, either upon appeal or upon application to Her

"Majesty's Court of Queen's Bench." These are little more than corrections of verbal omissions in the English statute, which must, I think, be construed as intending what the Irish statute expresses in clearer words.

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PENNEFATHER, B.

My LORD CHIEF BARON has gone so very fully and ably into this case, that I shall only add, I quite concur in all that he has said, and think it unnecessary for me to do anything more than observe upon the form of the order which it occurs to me we ought to pronounce. I may say, however, that I think the proper construction of the Act is, to hold that the proviso in the 2nd section ought to be confined to the actions mentioned in that section. I think the order we ought to make is, to set aside the whole of the plaint, calling that the plaint which commences with the statement of the causes of action, but not touching the summons, for the reasons mentioned by my LORD CHIEF BARON. It is not our intention to deprive the plaintiff of the right, if any right he had, of bringing an action : but we set aside the plaint, with liberty to the plaintiff to file such complaint as he may be advised ; that to be done within a limited time, with liberty to the defendants to plead thereto : and if the plaintiff shall think fit to make that amendment, it appears to me that he ought to pay the costs of this motion ; but if, on the other hand, he should determine not to proceed further in the action, I think it would be right to say, no costs on this motion. It is for him to consider what course he ought to adopt.

RICHARDS, B.

The LORD CHIEF BARON has, certainly, very fully and clearly expounded this Act of Parliament, and I agree in everything that he has said on that subject. With regard, however, to the fourth count of the plaint, I am inclined to take a different view from that expressed by others. It appears to me impossible to construe the fourth count as in any respect founded upon the 1st section of the Act ; because that section expressly provides "That every action " hereafter to be brought against any Justice of the Peace in

E. T. 1858. "Ireland, in any of Her Majesty's Superior Courts of Law at
Exchequer. " Dublin, for any act done by him in the execution of his duty as
LALOR "such Justice, with respect to any matter *within* his jurisdiction as
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BLAND. "such Justice, shall be an action on the case as for a tort." Now,
does not the plaintiff expressly allege that the act complained of
was an act done by the Magistrate, not within his jurisdiction, but
without it? And where the plaintiff himself says that the act done
was an act done without the jurisdiction of the Magistrate, how can
it be said that the count which complains of that act is within the
1st section of the statute, which is expressly declared to be applica-
ble only to cases where the act done is an act done by the
Magistrate in the execution of his duty? I think it is impossible,
with great deference, that the fourth count can be considered as
falling within the provisions of the 1st section of the Act. The
averment was probably intended as matter of aggravation; but
that cannot change the legal character of the pleading, which is
clearly a count in trespass. If that be so, I do not see why it should
not share the same fate as the others: is it because the pleader has
ingeniously, not to say cunningly, thrown into the count the words
"maliciously, and without reasonable or probable cause?" These
words probably were introduced for the very purpose of enabling
the plaintiff to insist, in argument, that this was a count in case,
and not a count in trespass; and, if that should not be to his advan-
tage, that he might then turn round and say, it is a count in trespass,
and not in case. Now I do not think pleading of that kind is to be
encouraged; and where a party has thought fit to state his cause of
complaint in such a shape, I do not think he ought to be allowed to
amend, merely because, by the provisions of another section of the
statute, his action would otherwise be barred. If he has wrongs to
be redressed, let him avail himself of his legal remedy, and bring
his action within the time limited by law. There is a very excellent
case in point upon this branch of the case, *Roberts v. Bate* (a). That
was a case where, if the writ were not amended, the party
would be barred of his action by reason of a plea of the Statute of
Limitations; but the Court there said such is the law, and we are

not to strain this case beyond its legal consequences. The law must take its course. That, too, was a case where there were substantive rights in property to be dealt with, not such a speculative action as the present. It strikes me that that is a proper principle to be applied to the present case. If a Magistrate has done an illegal act, let him be sued, but let him be sued according to the law of the land ; and if the law of the land protects him, and the plaintiff suffers thereby any real or imaginary mischief, he has himself alone to blame ; and if he does not choose to avail himself within the proper time of his remedy, let him take the consequences. I would follow the words of the Act, and set those proceedings aside, without regard to what the plaintiff's claim for redress may be. In other respects I concur with my LORD CHIEF BARON.

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GREENE, B.

I should have satisfied myself by expressing my concurrence in the rule pronounced by my LORD CHIEF BARON, but that I wish to say a few words with reference to what fell from my Brother RICHARDS upon the fourth count. My LORD CHIEF BARON considers that count sustainable under the 1st section of the Act ; my Brother RICHARDS considers it within the 2nd section. I wish to be understood to pronounce no opinion upon either of those points ; and it is because I cannot pronounce any such opinion, that I think the count bad, and one to be set aside. It is embarrassing, because we cannot understand whether it is a count under the 1st or under the 2nd section of the Act. I think, therefore, the fourth count ought to be set aside ; but I quite concur with my LORD CHIEF BARON and my Brother PENNEFATHER, that the plaintiff ought to be allowed to make his case in Court.

Rule accordingly.

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JULIAN v. LOUGHNANE.

June 10, 12.

An agreement USE AND OCCUPATION.—The summons and plaint claimed a sum of between a landlord and of £93. 13s. 7d., for money payable by the defendant to the plaintiff his tenant, that the tenant for the defendant's use, by the plaintiff's permission, of certain would make permanent improvements lands in the county of Kerry. Plea, that the plaintiff, at the commencement of this suit was, and still is, indebted to the defendant in upon the lands demised, and an amount equal to the plaintiff's claim; for that it was agreed would lay out and expend money in so doing, and that the landlord request, pay the value of the improvements so made, was in so doing, the said plaintiff would, upon request, pay to him the Held (the making of the improvements and their value being averred) to be properly made the subject of set-off to an action by the landlord for use and occupation. (RICHARDS, B., dissentient.)

Between the plaintiff and the defendant, before the commencement of this suit, that in consideration that the defendant would make permanent improvements upon the lands and premises in the summons and plaint mentioned, and would lay out and expend money in so doing, the said plaintiff would, upon request, pay to him the value of the improvements, which he should so make upon said lands; and the defendant says that he, relying on the said promise and agreement of the plaintiff, did afterwards, and before the commencement of this suit, make valuable permanent improvements upon said lands and premises, and expended large sums of money, amounting to £250, in such permanent improvements, and that such improvements were of the value of £196. 18s. 6d., and that the said plaintiff has not paid same, or any part thereof, to the said defendant.

Held, secondly, that a

plea of the agreement, which contained no allegation of a request nor notice, was bad.

Demurrer to this defence.—Because the matters thereby sought to be set off cannot be set off in law, and because the defendant seeks thereby to set off an unliquidated demand; and because, even supposing such agreement to have existed, no right of set-off arose therefrom; and because said defence shows no debt which the defendant is entitled to set off; and because, further, even supposing the alleged value of the improvements could constitute a debt capable of being set off, yet, under the terms of the agreement, a request on the defendant's part was necessary, and no such request is averred or shown.

C. Barry (with him *E. Sullivan*), for the demurrer.

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v.

The first question is, whether the liability stated in this plea is one that can be made the subject of a set-off? We submit it is not. It is not a mutual debt, within the meaning of any of the statutes of set-off. The demand is clearly unliquidated, and so appears upon the face of the defence. It would be necessary to ascertain, first, what precise improvements were made; secondly, whether they were permanent, and thirdly, what was their value to the lands; for it is not the expenditure made upon them, but their actual value to the premises, which is to be paid for. How could these questions be determined without the intervention of a jury? It makes no difference whether the absence of liquidation appear upon the defendant's or the plaintiff's demand: if either be unliquidated, the demands are not mutual debts. In *Colson v. Welsh* (*a*), it was held that, to an action for not paying over a sum of money pursuant to agreement, a set-off could not be pleaded. So in *Crawford v. Stirling* (*b*), a guarantee to the amount of a certain sum of money, given for a third person, was not allowed to be set off; and Lord Ellenborough there said that, to make a sum admissible as a set-off, the sum should be settled in moneys numbered. The same principle was acted on in *Morley v. Inglis* (*c*), and in *Luckie v. Bushby* (*d*). That case resembles the present in this respect, that there had been an adjustment of the proportional sum, which the defendant was to pay, and that adjustment was averred in the plea, as here the value of the improvements is averred to be £196. 18s. 6d., and yet it was held that the demand was for unliquidated damages. Secondly, the defence is bad, as not containing an averment of a request to pay the money. The promise is a special collateral promise to pay upon request, and an averment of request is necessary: *Batton v. Spearman* (*e*); *Berks v. Trippet* (*f*).

H. P. Jellett and *H. Chatterton*, contra.

We admit the demand, to be available as a set-off, must be

(*a*) 1 Esp. 378.

(*b*) 4 Esp. 207.

(*c*) 5 Scott, 314.

(*d*) 13 C. B. 864.

(*e*) 9 Ad. & Eliz. 298.

(*f*) 1 Saund. 32.

T. T. 1858. liquidated, but it is not necessary it should be such a liquidated *Exchequer.* demand as that an action of debt could be maintained upon it. It is well settled that a demand for goods sold and delivered may be the subject of set-off, although the claim is upon a *quantum meruit.* The true test is that put by Lord Mansfield in *Howlet v. Strickland* (*a*), whether *indebitatus assumpsit* could be brought for it? and in this case *indebitatus assumpsit* would lie. Although a contract may be in the first instance executory, yet if the terms of the agreement be performed on one side, and nothing is to be done by the other party but a money payment, such payment may be enforced by *indebitatus assumpsit*: *Clutterbuck v. Coffin* (*b*) ; 2 *Smith's L. C.* (*Cutter v. Powell, notis*). So here there is a contract between the landlord and his tenant that the tenant should make certain improvements, and that the landlord should pay the value of them when made. Before the Act abolishing arrest on mesne process was passed, the rule was, that a defendant could not be arrested and held to bail on the common affidavit, unless the demand were one on which *indebitatus assumpsit* could be maintained. So in *Cope v. Joseph* (*c*), it was decided that the common affidavit was sufficient, where the defendant had given a guarantee for the payment of goods which might be sold to another to the extent of £300. *Hutchinson v. Sydney* (*d*) is precisely to the same effect. The case of *Crawford v. Stirling* is distinguishable; there the guarantee was to secure a sum due by a person who had become bankrupt, and no dividend had been struck. The liability of the principal, and consequently of his surety, was still unliquidated and unascertained. There are two things here to be ascertained; first, the permanency of the improvements, and secondly, their value. It is admitted by the demurrer that permanent improvements were made; and in every action upon a *quantum meruit* for services rendered, it is necessary to ascertain the value of the services. *Luckie v. Bushby* is distinguishable, for the action was not brought upon the adjustment, which it was admitted was not conclusive upon the parties, and could only be used as a matter of evidence; the

(*a*) *Cowp.* 56.

(*b*) 3 *Man. & G.* 842.

(*c*) 9 *Price*, 155.

(*d*) 10 *Exch.* 438.

plaintiff might therefore have proved a loss either greater or less than the amount of the adjustment. It can make no difference that the contract in this case was to do something in reference to lands. If I hand over a piece of gold to a jeweller to do some work upon it under a specification, and upon a special contract, when the work is done, its value may be made matter off set-off, although it involves a consideration of the terms of the contract, and compliance with them on the part of the jeweller. The case of *Roberts v. Havelock* (a) is an authority for that proposition. If the action of *indebitatus assumpsit* lies, it follows, almost as a logical consequence, that an averment of a special request is not necessary. *Wallis v. Scott* (b) is directly in point upon that question. There is no necessity to allege a request, unless where the necessity for it arises upon a collateral promise.

E. Sullivan, in reply.

The matter attempted to be set off clearly sounds in unliquidated damages. It is true the pleading contains an allegation that the value of the improvements was a certain sum, but a party cannot make the damages liquidated by an averment of that kind. We must look, independently of the pleadings, to the subject-matter, and clearly there is no fixed standard by which the damages can be measured. The defendant might have expended £500 in improvements, and not recover £50 from the landlord, for it is the value of the improvements to the lands which is to be paid for. In *Hutchinson v. Sydney*, the demand was allowed to be set off, because it might have been recovered as money paid to the plaintiff's use.

Cur. ad. vult.

PIGOT, C. B.

In this case of *Julian v. Loughnane*, which was argued before us a few days ago, the plaintiff's demand was for use and occupation. The defence, which was pleaded by way of set-off, stated, "That it was agreed between the plaintiff and the defendant, before

June 12.

(a) 3 B. & Ad. 404.

(b) 1 Stra. 88.

T. T. 1858. "the commencement of this suit, that, in consideration that the
Eschequer. "defendant would make permanent improvements upon the lands
 JULIAN "and premises in the summons and plaint mentioned, and would
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 LOUGHANE "lay out and expend money in so doing, the said plaintiff would,
 "upon request, pay to him the value of the improvements which
 "he should so make upon said lands; and the defendant says
 "that he, relying on the said promise and agreement of the plaintiff,
 "did afterwards, and before the commencement of this suit, make
 "valuable permanent improvements upon said lands and premises,
 "and expended large sums of money, amounting to £250, in such
 "permanent improvements, and that such improvements were of
 "the value of £196. 18s. 6d., and that the said plaintiff has not
 "paid same, or any part thereof, to the said defendant." That
 is the statement of a contract of the defendant to pay, upon request,
 the value of permanent improvements to be made by the defendant
 upon the plaintiff's lands, held, by the plaintiff's permission, by
 the defendant, being the lands for the use and occupation of which
 this action is brought. Two objections have been urged against
 this defence; first, that the subject-matter is not one which can
 properly be made the ground of set-off; secondly, that the defence
 contains no averment of a request previous to the bringing of the
 action.

It appears to me that if the case rested upon the first of those objections, this defence ought to be upheld. I do not think it distinguishable from some of the cases cited in the course of the argument, in which demands, consisting of a variety of matters comprised in a contract, were treated as being properly the subject of set-off. In *Morley v. Inglis* (a), one of the tests by which, in the judgment of Lord Chief Justice Tindal, the validity of such a plea was to be determined, was the question whether or not, if the defendant had been plaintiff suing in an action for the subject-matter of his set-off, and the plaintiff had been defendant in such action, the latter could have set off his demand against that of his adversary? Suppose, in the present instance, the defendant had brought his action upon the contract on which he now

(a) 5 Scott, 514.

relies, and had stated in his plaint, in the very terms of this defence, T. T. 1838.
that, in consideration that he would make permanent improvements
on lands held by him under the defendant in such action, the
defendant had agreed to pay him the value of those improvements, Exchequer.
and had then alleged that he did make permanent improvements on
the lands, specifying their value, and that he had requested defendant
to pay for them, but that the defendant had refused, it appears
to me very plain that that would be a contract not sounding in
damages (in the proper sense of those words), being a contract to do
certain specified matters, with respect to which the only questions of
fact to be determined would be, first, whether in point of fact the
things were done; and, secondly, if they were done, what was their
value? That is the ordinary demand upon a *quantum meruit*. I
cannot distinguish such a contract in principle from an ordinary
contract, where the sum to be paid for services is not specially
agreed on. If a party be employed to do a variety of works,
upon conditions most specific and complex, and executes the works
according to the contract, he is entitled to sue for the amount
of his demand in *indebitatus assumpsit*, and to recover according
to the price of those services, if that be agreed on, or, according
to their value, if the price was not fixed by the contract. The
ordinary rule applies, that, upon such a contract executed *indebitatus assumpsit* lies: *Clarke v. Gray* (a); 2 *Smith's Leading Cases*,
p. 10. The question whether or not it is necessary to have the
sum ascertained by a jury, where the parties have not themselves
ascertained it, cannot, in all cases, be treated as a sufficient test
for determining whether a plea of set-off shall be allowed. In
every case of a *quantum meruit*, the sum must, if not ascertained
by the agreement of the parties, be determined through the inter-
vention of a jury. In the present instance, the value of the
improvements is the only thing to be determined, the improve-
ments having been made according to the contract, which must
be assumed upon this record. It appears to me that the rule
id certum est quod certum reddi potest applies, and that, if the
contract has been performed by the execution of the works, and

(a) 6 East, 569.

T. T. 1858. a request has been made (where that is necessary), a debt at Exchequer. once becomes due, for the value of the works, to the person who has executed them, from the person for whom they were executed, JULIAN v. LOUGHNAME and who has contracted to pay for them. It does not, in my opinion, create any distinction that this was done in reference to land instead of a chattel. If it had been done in reference to a house, upon which the defendant had been employed by the plaintiff to execute some work, and he had done the work, and provided the necessary materials, it could not be successfully contended that his demand for such work and materials could not be made the subject of a plea of set-off.

Among the forms of *indebitatus counts*, there are to be found, both in *Chitty* and *Wentworth*, forms in *indebitatus assumpit*, for crops and improvements on lands: 2 *Chitty*, p. 80, ed. of 1831; 1 *Went.*, p. 188; 3 *Went.*, p. 58. In *Clarke v. Westrope* (a), a landlord entered into an arrangement with his tenant, according to which he was to take the lands subject to certain conditions, and according to which he was, upon quitting the farm, to be allowed for certain improvements. Pending the tenancy, the tenant sold to another person, who entered into a contract, by which he was to pay for the tillage then in progress, and for the manure and straw then upon the farm, at a valuation. The nature of this demand was described in terms not dissimilar to those of the present plea, and was stated in the form of *indebitatus assumpit*. That case was very much considered upon one of the points in it; but no question was ever made as to the propriety of having that demand proved under the *indebitatus count*. The present case is entirely distinguishable from that of a guarantee, or a policy of insurance. A guarantee, as well as a policy of insurance, is a contract of indemnity; and any action brought upon either of those contracts necessarily sounds in damages. With reference to a policy of insurance, where the insurance is upon goods transmitted by sea, and the demand is for a partial loss, the thing to be proved is the value of the goods, just as if they were taken in trover and trespass. So, in the case of a guarantee,

(a) 18 C. B. 765.

what the jury have to determine is, not whether any specific debt T. T. 1858.
is due, but what was the amount of the loss which the plaintiff *Exchequer.*
has sustained. I should therefore be of opinion, if the first objec- *—*
tion were the only one to this defence, that it must fail; and the LOUGHNANE
defence shows a demand, which is a proper matter of set-off. I
have stated my reasons for this opinion thus at large, because the
statute of set-off is a very beneficial statute, preventing circuitu-
ity of suit, and one of which I think the Court ought to be careful
not to restrict the operation.

This defence, however, has been impeached upon another ground,
upon which it appears to me to be defective.

The contract is to pay the value of the improvements, upon re-
quest, and the defence avers neither a request nor notice. I am aware
that in the ordinary forms of pleas of set-off, which are founded on
the same demand that would support a count in *indebitatus assump-
tus*, an averment of a request is seldom or ever introduced. In all
the old forms of pleading, the contract was stated to be to pay the
amount when thereunto requested. The general allegation (*licet sapi-
us requisitus*) was always introduced into the count in *indebitatus assump-
tus*. But in pleas of set-off, though the sum was stated to
be payable upon request, the allegation of a request was scarcely
ever employed, nor was it necessary; because the duty arose upon
the preceding circumstances, and founded a legal liability upon a
contract which the law implied. But it has been held, from very
early times, that whenever a contract was of such a character that
it included in it, from its nature, an obligation to make a request,
the general allegation of a request was not sufficient, but a specific
allegation (with a statement of time and place) was necessary,
which then became a traversable averment. The tests that are
given in some of the old cases are very quaint; but they appear
to me to establish that it must be determined by the nature of the
contract itself, whether it was or was not a mere surplusage to
allege a request. The old cases are collected in *Archbold on Plead-
ing*, pp. 90-92, 150-153. These passages are founded on Chief
Baron Comyn's *Treatise*, and may be found in that work under the
title *Pleader*, C, pp. 69, 70. At p. 90, *Archbold* says:—"Besides

T. T. 1858. "the case of a condition precedent, &c., now treated of, there are other instances in which averments are necessary in a declaration : as, for instance, where a man contracts to do a thing upon request, the request is *quasi* a condition precedent to his performing his contract, and consequently must be averred in the declaration. In some cases this averment must be special, stating the time and place, &c., at which the request was made; in others, the common averment *licet sapius requisitus* is sufficient, and no actual request need be made or proved, but the bringing of the action is deemed a sufficient request of itself." And at p. 153 :—"But if the action be for a collateral sum to be paid on request, the request is parcel of the agreement, and traversable, and ought to be specially alleged with the time of the request." What is a collateral agreement is one of those matters upon which considerable difficulty and ambiguity have existed ; but it is quite plain, if the nature of the contract be such as necessarily to import that the party was not to pay until he was asked, the averment of a request is necessary.

There is another rule, very nearly connected with that which requires the allegation of a previous request in declaring upon such contracts as I have described—*notice* of the plaintiff's demand must be averred in a variety of cases in which the plaintiff sues on contract, where notice is necessary for the purpose of completing the defendant's liability. Of this rule several examples are given at p. 90 of *Archbold* :—"The declaration must contain an averment of notice having been given to the defendant of a certain act done, in all cases where the action does not lie before such notice has been given. Thus, if the act on which the plaintiff's demand arises be secret, and lie only within the plaintiff's knowledge; as if a man promise to pay such a rate for wares as any other paid him, the plaintiff should allege notice of the rate that another gave ; or to deliver so much corn at the fair, if the plaintiff approve of it, the plaintiff must aver a notice that he approved of it ; and the same upon a promise to repay so much to B, if he disliked such lands ; or to seal such an escrow as he or his Counsel shall devise ; or to account before auditors whom the obligee

"shall assign ; or to pay plaintiff all his costs in such a suit, or the T. T. 1858.
 "damages he sustained by such a battery." In the three following Exchequer.
 cases this principle was very clearly illustrated : *Harris v. Fer-*
rand (a); *Holmes v. Twist (b)*; *Conin-^{sky} v. Rodd (c)*. Now what JULIAN
 was the meaning of the contract in the case before us ? That the LOUGHNAME
 landlord should pay to the tenant the value of the stipulated im-
 provements which the tenant should make upon the land. The land
 is in the occupation of the tenant, and not of the landlord. The
 tenant, according to the contract pleaded, may make the improve-
 ments at any time, and in any portions. It would be most un-
 reasonable to hold that the landlord, either in person or by deputy,
 should be bound to put himself in a condition of always knowing
 everything done in the progress of such improvements. If he does not
 know of the improvements, he does not acquire the means of know-
 ing whether such a demand as this defence describes does or does
 not exist ; and it would be inconsistent with reason and justice to
 hold either that he should be sued for such improvements upon an
indebitatus assumpit, or that he should be met by such a defence
 as this in an action for the rent of the lands, without having been
 once apprised that such a demand existed, or that any such im-
 provements were made. The inconvenience of his not knowing
 of the existence of such a demand, before the bringing of his
 action, is very strongly illustrated in the present case. In the
 absence of any averment of notice or request, we cannot assume
 that there was either. In ignorance of the improvements, the
 landlord sues for his rent, and he is for the first time put
 upon inquiry as to the existence and extent of those improve-
 ments, after he has incurred the expense of commencing the
 action, which he was perfectly warranted in bringing if the im-
 provements were not made, and in reference to which it is most
 important that he should have known their existence, and have had
 the means of ascertaining their value before engaging in a law suit
 with his tenant. The knowledge of those improvements, and of their
 value, might have determined him not to bring the action, and, at

(a) Hard. 42.

(b) Hob. 51.

(c) Lut. 231.

T. T. 1858. all events, would have regulated the amount of the demand for
Exchequer. which he would have sued. We ought to give to the contracts of
JULIAN men a reasonable construction ; and upon that construction of this
v. contract, which appears to me to be the reasonable and the safe one,
LOUGHNAME I am of opinion that, in conformity with the principles of the autho-
rities which I have cited, there ought to have been either a request
or notice, before a debt was created, on which the present defendant
could sue. Whether the averment of notice would have made
unnecessary the averment of a request, it is unnecessary to decide;
because here there is neither. The demurrer must be allowed.

PENNEFATHER, B.

My LORD CHIEF BARON has gone so fully into the case, that
I have nothing further to say than that I agree with him on both
points. If a request had been properly alleged, I would say that
this is a sufficient debt to raise an obligation on which *indebitatus
assumpsit* might be maintained, after performance by one of the two
contracting parties. I think it is not a very accurate expression,
in cases like the present, to say that a demand sounds in damages;
because, wherever the matter is not precisely ascertained, it sounds
in damages, although it be a claim founded on contract. Thus in
the ordinary case of an action for work and labour, or of *indebitatus
assumpsit* upon a *quantum meruit*, wherever that form of action
may lie, the matter is not ascertained, but still there exists a suffi-
cient debt within the meaning of the statutes of set-off. It is not
like an action of assault, or, in short, an action not founded on
contract. I think that, although there may be difficulty in ascer-
taining the value of the improvements to be allowed to the tenant,
there is yet a standard by which that value may be estimated, and,
therefore, I am of opinion that this is a sufficient statement of value
to be pleaded as a set-off. Still I think a request ought to have
been averred, because the lands were the property of the tenant,
and the money became a debt due to him only on request made
pursuant to the contract. On this ground, therefore, the plea not
having stated request nor notice, I think the demurrer ought to
be allowed.

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I quite concur with my learned Brethren in considering that this demurrer should be allowed, but I am rather disposed to be of opinion that it ought to be allowed on both grounds of objection to the pleading. The defence is very peculiar in its form; it states that, in consideration that the defendant would make permanent improvements upon the lands, and would lay out and expend money in so doing, the plaintiff would, upon request, pay the value of the improvements which he should so make. It then avers that the plaintiff did make valuable permanent improvements, and at the end it states that those improvements were of the value of £196. 18s. 6d. It does not aver that there was any meeting between the plaintiff and the defendant to ascertain the value of the improvements, but in general terms that the value was so much. I doubt very much whether the demand of the defendant, founded on such a contract, can be treated as a debt at all, looking to the way in which the claim is put forward. It is not like a claim for work and labour, where you have a standard to go by, nor like a claim on foot of an attorney's bill of costs, in which case also there is a standard, but it is an ideal thing, the value of the improvements, and a thing which, unless the parties agree, can never be ascertained without the intervention of a jury. I think it does sound in damages; and although that circumstance alone might not entitle the plaintiff to our judgment, I cannot think the claim capable of being reduced to such a state of certainty as would justify the Court in considering the demands mutual debts, within the meaning of the statutes of set-off.

Suppose a man employs an attorney, and the contract is not that he shall be paid according to his labour, but according to the value he renders his client, is not that a special contract, and could a demand on foot of it be treated as a mutual debt, so as to be made the subject of set-off? The attorney may say, "I laid out £50, but that outlay produced to you the value of £5000, and that is the value of the services which I rendered;" are we to say that that demand can be relied on as a set-off? In this case the defendant may not have laid out the sum stated in his plea, and his expenditure

T. T. 1858. is not to be the standard of his demand, but the value resulting to
Exchequer. the plaintiff from the improvements. In my opinion that is an
 JULIAN undefined thing, and there is no standard by which it can be ascer-
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 LOUGHNAHE tained, unless it be submitted to the intervention of a jury. With
 regard to the other point, I think we must consider, from the
 defendant's own statement, that he meant to represent a request
 as an essential element in the contract; and, if that be so, it fortifies
 the other position very much, because, if a request were such an
 element in the contract that, until it were made, the defendant
 could not take advantage of it, it shows the very special nature
 of the contract. Under these circumstances, I am of opinion, with
 the rest of the Court, that this demurrer ought to be allowed.*

Demurrer allowed.

* GREENE, B., *absente.*

IVERS v. BAINBRIDGE.

May 1.

Where a judgment had for the plaintiff is reversed by the defendant, for error in fact, the defendant is not entitled to include in the judgment of reversal the costs of defending the action.

ERROR IN FACT.—In this case, which was an action for libel, the plaintiff, J. Ivers, had recovered a verdict for £35 damages and 6d. costs. Judgment was marked for the sum of £86. 1s. 9d. The defendant had appeared and pleaded by attorney, but subsequently to the entry of the judgment, he, by his guardian, assigned error in fact in the judgment, upon the ground that he had appeared by attorney, though an infant. The plaintiff then served a notice, confessing the error assigned, and accordingly judgment of reversal in error was entered by the defendant. This judgment recited the proceedings in the usual form; declared the judgment for the plaintiff to be revoked and annulled, and concluded as follows:—"And it is further considered by the said Court that the said defendant do recover against the plaintiff, for his costs of defence of the said

"action, £_____, by the same Court now here adjudged to the said E. T. 1858.
"defendant, and that the said defendant have execution thereof."

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R. Armstrong (with him *W. J. Sidney*) now moved, on the part *BAINBRIDGE* of the plaintiff, that the judgment of reversal in error might be varied and amended, by expunging therefrom those latter words.

The defendant is not entitled to the costs of the defence, where, as here, a judgment had for the plaintiff is reversed for error: *Wyeil v. Stapleton* (*a*); *Bell v. Potts* (*b*). The case of *Gildart v. Gladstone* (*c*) is not an authority to the contrary, for there judgment was given for the plaintiffs below upon a special verdict, in which there was an alternate finding by the jury, and the Court were able to give final judgment; which distinguishes that case from those in which, as upon an ordinary reversal of a judgment for the plaintiff, the judgment is *quod nil capiat per breve*. At Common Law, it is clear there could be no costs upon a reversal for error, and there is no statute giving them: 2 *Saund.*, p. 101, *f. f.* The defendant will rely on a passage in *Tidd's Pract.*, p. 1181 (9th ed.); "Where a judgment for the plaintiff was reversed on a writ of "error in fact, brought by the defendant, the Court held that the "plaintiff in error was entitled to his costs' of the defence of the "original action, though not to the costs in error;" and for that proposition he cites *Anon., H. T.*, 40 *G. 3, K. B.* The same statement is found in 2 *Saund.* 101, *g. g.*, note (*o*); in *Tidd's New Practice*, p. 618; in *Harrison's Index*, and *Chitty's Archbold*: but it is merely a transcript of Mr. *Tidd's dictum*, which is not law. It is against all reason that a party should have the costs of a defence on which he was actually defeated, because by his own wrong in appearing improperly he has rendered the verdict against himself abortive. It does not appear from *Tidd*, whether the costs in the case he refers to were given by force of the judgment of reversal, or by an order of the Court on motion. If the case ever occurred, it must have been where the judgment was final upon the merits, and not as here, where the merits are not at all disposed of.

(*a*) 1 *Str.* 615.

(*b*) 5 *East*, 49.

(*c*) 12 *East*, 668.

E. T. 1858. The proper form of a judgment of reversal is *simpliciter, quod Eschequer. judicium reversetur*, and it is against all the precedents to introduce IVERS v. into the judgments the costs of defence: *Parker v. Harris* (a); BAINBRIDGE 1 *Roll. Abr.*, f. 1, 2, 3; *Baker v. Lade* (b).

D. Lynch and *J. M'Mahon*, for the defendant.

It is now sought for the first time to disturb a practice which has always been considered settled.—[PENNEFATHER, B. Is there any practice that, *per se*, can give costs? Is not the right to costs derived from statute, and can you say by what statute [you are entitled to costs, where the judgment below is reversed *simpliciter*, leaving the cause of action still pending? The case of a special verdict is quite different, for there is a verdict there for the party ultimately successful.]—Mr. *Tidd's* book has always been considered one of the highest authority, and every edition of his work contains the same statement of the law.—[PIGOR. C. B. I consider that passage in Mr. *Tidd's* book very high authority, from its mere statement by him in his work; but when we find a statement upon an important question of practice, resting upon a case of which there is no printed report, for which no reasons are stated, and which no subsequent decision follows, we are bound to determine what the law really is; for though this is a question of practice, it must be a practice founded on law.]—If Mr. *Tidd's* statement of the practice is erroneous, the error is a very general one, for the law is stated in the same way in *Hullock on Costs*, p. 297; 2 *Saund.*, p. 101, g, g.—[PIGOR. C. B. The judgment for the plaintiff has been reversed *simpliciter*, and there is now no judgment for you. What is the judgment you say you are entitled to?]—We are entitled to be restored to the same position in which we were, for we have been put to expense in defending the action.—[PENNEFATHER, B. These costs have not been levied against you. The Court cannot speculate whether or not a party has paid his attorney.]—The Court will assume that the text-writers have stated the practice truly, when no authority has been cited to the contrary.

W. J. Sidney, in reply, was stopped by the Court.

(a) 1 *Salk.* 262.

(b) *Carth.* 254.

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We are of opinion that this motion ought to be complied with. Mr. *Tidd's* book is undoubtedly one of considerable authority on matters of practice, and has been so treated both in this country and in England. But if the *Anonymous case* cited by him (p. 1181) be interpreted as laying down, as a general rule of practice, that in every case of the reversal of a judgment against the defendant for error in fact upon a defendant's writ of error, the defendant shall be adjudged his costs of the original action, I cannot concur in maintaining that proposition. The costs of a judgment can only be given under the authority of some statute; and there is none applicable to the case before us. It is impossible, consistently with the frame of the record in this case, to allow costs to be awarded in it. This is not a case in which, on the reversal of the plaintiff's judgment, judgment has been given for the defendant in the action, the Court, on the writ of error, giving such judgment as the Court ought to have given in the original suit. In such a case as that, costs might be given as incident to the judgment. Costs, where they are allowed upon the record, must be incident to a judgment which gives some remedy, or affirms or disaffirms some right, or determines that a plaintiff is not entitled to what he claims. The judgment for a defendant is, that the plaintiff's writ shall be quashed, or (upon a plenary defence), that the plaintiff shall take nothing by his writ, and the defendant shall go thereof without day. To the latter judgment costs are incident by statute. But the judgment for the defendant, in the present instance, is nothing more than an order upon record, that the former judgment shall be revoked, annulled and altogether held for nought, and that the defendant shall be restored to all things which he hath lost by occasion of the said judgment, that is, that the judgment shall be reversed, *simpliciter*, and the defendant shall recover back whatever may have been taken from him under it. Since no execution or payment took place under the original judgment in this case, the defendant has nothing to recover. The effect of the adjudication is, that by the plaintiff's former judgment the plaintiff shall gain nothing, and that the defendant shall be in the same condition as

E. T. 1858. if it had not been given, that is, that there shall not be a judgment
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against him. The adjudication on the record gives to the defendant
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BAINBRIDGE nothing more than exemption from the liability which the former
judgment, if not reversed, would have imposed. There is not, and
perhaps there could not be, the ordinary judgment, that the plaintiff
take nothing by his writ, and that the defendant should go without
day; for the writ (for aught that appears on the record) may have
been for a cause of action which the plaintiff was entitled to bring,
and in which he in fact obtained a verdict, and the judgment which
has been reversed. The error (*viz.*, the defendant, an infant, appear-
ing and pleading by attorney and not by guardian) was in a matter
subsequent to the writ, and unconnected with the merits of the
action. There is, in effect, on the record, no judgment for the
defendant in the original action; and there being none such, there is
nothing to which costs in the original action can be annexed under
the authority of any statute. It is quite clear that in no event
could the defendant be entitled to the costs in error.

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v.

THE DUBLIN AND WICKLOW RAILWAY COMPANY.

*(Common Pleas.)*April 19, 21.

THIS was a motion on the part of the defendants, to compel the plaintiff to give security for costs, in an action against the Company, for charging the plaintiff with a fare exceeding by one halfpenny the rate which, by law, they were entitled to exact from passengers travelling by parliamentary third class trains from Merrion to Westland-row, in the city of Dublin. It appeared by the affidavit of the attorney of the Company, that a committee of persons had been formed, designated the "Wayside Committee," for the purpose of endeavouring to make the Company lower the amount of their fares at the intermediate wayside stations; that the present action had been brought under the advice and at the instigation of said committee; that the plaintiff's attorney was himself an active member of said committee; and that the plaintiff had been, as deponent believed, employed by said committee, or by the persons for whom the committee acted, or some of them, to bring this action, and had been chosen, as such, as a person who, if there should be judgment against him, would be altogether unable to pay the costs of the suit, having been ascertained, upon inquiry, to be a person of a very humble rank of life, and a working gardener by trade, living at Booterstown, in a very poor cottage, little better than a cabin. The deponent likewise stated his own belief that this action was not carried on at the plaintiff's expense, or with a view to any benefit to be derived therefrom by the plaintiff; but that the said proceedings were instituted and carried on

A brought an action against the D. & W. Railway Co., for an alleged overcharge of third class parliamentary passenger fare, exceeding by one halfpenny the rate prescribed by Act of Parliament. It appeared by the affidavits that the action had been brought at the instigation of certain parties called the "Wayside Committee," associated for the purpose of lowering the Railway fares; that the plaintiff was a person in a very humble rank of life; and it did not appear that the plaintiff's attorney, who was also a member of the above committee, looked to him for payment of his costs. The Court, being of opinion, un-

der the circumstances, that the present action could not be considered to be that of the plaintiff, and that it was substantially that of the committee, stayed the proceedings, until security for costs should be given.

E. T. 1858. at the expense of said "Wayside Committee," or the persons for
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The plaintiff, in his affidavit, denied that the action had been brought at the instigation of the "Wayside Committee;" but, on the contrary, had been brought by deponent, for the *bona fide* purpose of enabling deponent to travel on the Railway at a fare not exceeding that allowed by law, it being an object to him, by reason of his humble circumstances, to be carried cheaply on the Dublin and Kingstown line on his daily business; that deponent having been informed, and believing, that the Company could not legally charge for portions of miles for passengers on the parliamentary trains, and having been actually charged the sum of two pence halfpenny instead of two pence for travelling in such train on the 2nd of February last, himself authorized the action to be brought, by reason of the benefit to be derived by himself therefrom; that deponent neither directly nor indirectly held communication with the "Wayside Committee," nor with the persons with whom they act, nor with any other person, save his attorney in the action, who, as deponent is for the first time informed, is a member of said committee. He also denied having ever known or been informed, save by the affidavit of the defendants' attorney, of the existence of the "Wayside Committee," or that he ever attended any of their meetings, or of those for whom said committee is stated to be acting.

The plaintiff's attorney also made an affidavit denying that the expenses of the present action were to be borne by the "Wayside Committee," or that he looks to them, or the persons for whom they act, for his costs; but that, having been informed by the plaintiff that he was charged the fare in question, and being advised that such was an illegal charge, undertook, upon being so informed by plaintiff, to carry on this action on his behalf; referring in proof thereof to a letter, dated the 4th of February last, written by him to the secretary of the Company, offering to be content with their undertaking to charge the plaintiff for the future at the lesser rate.

An affidavit in reply was subsequently made on the part of the

Company, for the purpose of showing the nature of the proceedings of the "Wayside Committee," in relation to the running of parliamentary trains by the Company, and that the plaintiff was acting at their instigation in bringing the present action.

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Chatterton, in support of the motion, contended that it sufficiently appeared by the affidavits, that the plaintiff had been put forward by the persons constituting the "Wayside Committee, to bring the action on their behalf. The existence of such a committee has not been denied at the other side. The plaintiff appears to have been ignorant of the wrong alleged to have been done him until he was informed of it; and the present proceedings have been instituted for an indirect purpose. He cited *Sheehy v. Dorman* (*a*); *Tennent v. Brown* (*b*).

Lawson and *William M. M'Cartney*, contra.

If it appeared that the plaintiff had been impelled by other parties to take the journey for the purpose of getting up the action, the case would have been different; but, on the contrary, he went in the course of his ordinary daily business. It is denied by Mr. Creagh, that the "Wayside Committee" is to bear the expense of the action.—[*BALL, J.* His statement is that he does not look to them for reimbursement.]—This case differs from that of *Sheehy v. Dorman*, where a plaintiff was procured by advertisement in the public papers, and it depended on the principle that there were other parties behind the scenes. Here the plaintiff sues for a personal injury. He cited *Egan v. Kircaldy* (*c*); *Burke v. Hutchinson* (*d*); *Ball v. Ross* (*e*); *Delahay v. Kelly* (*f*); *Hearsay v. Peacham* (*g*); *Mayers v. Evans* (*h*); *Stead v. Williams* (*i*); *Webb v. Ward* (*k*).

Chatterton replied.

Cur. ad. vult.

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|----------------------------------|---------------------------------------|
| (<i>a</i>) 2 Fox & Sm. 238. | (<i>b</i>) 5 B. & C. 228. |
| (<i>c</i>) 3 Ir. Law Rep. 542. | (<i>d</i>) 7 Ir. Eq. Rep. 508. |
| (<i>e</i>) 1 M. & Gr. 445. | (<i>f</i>) 2 Ir. Com. Law Rep. 234. |
| (<i>g</i>) 7 Dowl. 43. | (<i>h</i>) 7 B. M. 345. |
| (<i>i</i>) 5 C. B. 53. | (<i>k</i>) 7 T. R. 296. |

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April 21.

MONAHAN, C. J.

In this case, an application has been made that the action should be stayed until the plaintiff gave security for costs. The action is brought by the plaintiff, who is a market gardener, for the sum of one halfpenny; and there can be no doubt that, under the circumstances, notwithstanding the smallness of the cause of action, this was a proper action to be brought in the Superior Courts; for the question to be determined is, whether the plaintiff, and persons in his position, are entitled to travel over a certain part of the line upon payment of two pence or two pence halfpenny? If we were of opinion that this was a *bona fide* action, brought by Rice himself to try this question, no matter whether he were rich or poor, we should not consider this an improper action, nor compel him to give security for costs. But the case made by the Dublin and Wicklow Railway Company is, that this is not Rice's action, but that he has been put forward by other parties, for purposes of their own, and that this action is conducted for the benefit and at the expense of those persons. The case made by Mr. Guinness, the attorney for the Company, is, that the action is brought by parties called the "Wayside Committee," whose object is to drive the Company into making certain changes in their present fares; and it states that Rice is not bringing the action at his own expense, but at that of the "Wayside Committee." The same affidavit also contains an allegation that the attorney for the plaintiff is a member of such committee, as well as treasurer. In answer to those allegations, it is stated by Rice (and which I have no doubt is perfectly true) that he never heard of such a thing as a "Wayside Committee," and that it is not true that he brought this action at their instance, but that he employed the attorney himself, and that the only person who ever spoke to him on the subject was his attorney. He does not, however, allege that the action is brought at his own expense or risk, so far as concerns the costs of his attorney. The affidavit of Mr. Creagh (the plaintiff's attorney) is also to the same effect, namely, that the action is not brought at the instance of the "Wayside Committee," that he does not look to or hold the committee responsible for payment of his costs; that it is untrue that a sub-

scription has been made for the purpose of paying those costs ; but this affidavit is liable to the observation that, like the plaintiff's affidavit, it does not state who is to pay the costs of the present action ; it does not state that the plaintiff is to do so, and that the "Wayside Committee" is not to pay them. It leaves us to arrive at one of two conclusions, that either he is to pay them himself, or that there is some one else from whom he is to receive them. I mention this, not to lead to the conclusion that an attorney may not, in a proper case, take up for a pauper an action at his own risk, but merely because, in my opinion, we cannot draw any distinction between the present case and that of *Sheehy v. Dorman* (a). No doubt, in that case, the plaintiff was engaged in the same trade and interest with the parties putting him forward ; but the Court decided the case as they did because the costs of the action were not to be defrayed by him, but out of another fund, contributed by parties interested ; and they went upon the principle that the action was not substantially that of the plaintiff, but of other parties similarly interested ; the plaintiff is not to be put forward as the party to sue, so as thereby to enable the other parties to avoid the risk of costs. Upon these grounds, we are of opinion that the present case comes within the authorities, this being an action brought by others in Rice's name, who would not have stirred in the case without the suggestion and advice of his attorney ; and we therefore think that this motion must be granted, that the plaintiff should give security for costs, and that proceedings in the meantime be stayed.

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Rule accordingly.

(a) 2 Fox & Sm. 238.

E. T. 1858.
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THE DUBLIN AND WICKLOW RAILWAY COMPANY.

May 5, 8.

A sued the D. and W. Railway Co. for damages, for an alleged overcharge of one halfpenny, in respect of parliamentary third class passenger fare. The first count of the summons and plaint alleged that the overcharge of one halfpenny, in respect of parliamentary third class passenger fare, was for carrying plaintiff a fare of two pence half-penny for carrying him in a third class carriage from Merrion station to the terminal station at Westland-row, in Dublin, by the parliamentary train, the distance being less than three statute miles. The second count was for refusing to carry plaintiff from Merrion to Dublin, in a third class carriage, by the parliamentary train, for two pence, the distance being less than three statute miles. The defence alleged that the Merrion station was distant from the terminal station in Dublin more than two and a-half miles, to wit, two miles and a-half and 257 yards; that the fare appointed and the charge made by defendants for the conveyance of third class passengers from Merrion to Dublin by the parliamentary train is the sum of two pence halfpenny, being at a rate not exceeding one penny for each mile travelled, being a good and lawful charge for said journey; that the plaintiff having tendered a sum of two pence only, being a sum less than said fare, and having refused to pay the said fare of two pence halfpenny, which was demanded of him, the defendants refused to permit the plaintiff to travel by said train, or to convey him from Merrion to Dublin, and refused to give him a third class ticket, unless he paid the sum of two pence halfpenny, as they lawfully sought, for the cause aforesaid. The Company pleaded that the sum charged was a just and lawful charge for the journey.—*Held*, on demurrer, that the General Railway Act, 7 & 8 Vic., c. 85, applied to the present case; and that, inasmuch as by section 6 of that Act, the fare is to be measured by the number of miles actually travelled, without taking fractional distances into account, in the absence of any power in the Special Acts of the Company to charge for such distances, they had been guilty of an overcharge, and were liable to the present action.

Held also, that the 103rd General Rule respecting the obtaining of a Judge's certificate for full costs, where the amount recovered does not exceed £20, does not apply, where the cause is decided upon demurrer.

The demurrer to this defence set forth the following grounds, viz., that it did not disclose any right in the defendants to make a charge for fractional parts of a mile, by a cheap or parliamentary train, so far as relates to third class passengers, for their fare thereby; that it did not show any right to charge for any distance short of a mile, for the fare of a third class passenger by a parliamentary train; that it did not show any right to demand the sum of one halfpenny in the plaint mentioned; that the several Acts of Parliament under which the Company have their powers do not, nor do any of them, authorise such demand; that the defence did not disclose any right to make any charge to a third class passenger for his fare by parliamentary train, for any distance less than one whole mile actually travelled; nor to make any such charge in respect of any distance less than one whole mile, after one or more miles actually travelled by such passenger, even though such last-mentioned distance may have been actually travelled by such passenger.

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William M. Macartney and *Lawson* were heard in support of the demurrer.

Chatterton and the *Solicitor-General*, contra.

The following authorities were cited in the course of the argument: *Geldwit v. Gladstone* (a); *Kingston-on-Hull Dock Co. v. Browne* (b); *Webb v. Manchester and Leeds Railway Co.* (c); *Stourbridge Canal Co. v. Wheely* (d); *Hollinshead v. Leeds and Liverpool Canal Co.* (e); *Leeds and Liverpool Canal Co. v. Hustler* (f); *Britain v. Cromford Canal Co.* (g); *Portsmouth Floating Bridge Co. v. Nance* (h); *Stockton and Darlington Rail-*

(a) 11 East, 675.

(b) 2 B. & Ad. 43.

(c) 2 Rail. Cas. 736; S. C., 4 M. & C. 116.

(d) 2 B. & Ad. 792.

(e) 2 B. & Ald. 66.

(f) 1 B. & C. 424.

(g) 3 B. & Ald. 139.

(h) 6 Sc., N. R., 823.

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Cur. ad. vult.

MONAHAN, C. J., now delivered the judgment of the Court.

May 8. This was an action by the plaintiff Rice against the Dublin and Wicklow Railway Company, in which the complaint against them was for refusing to carry the plaintiff from Merrion to Westland-row, at the fare for which, he alleges, he ought to have been conveyed, and for demanding the sum of one halfpenny more than the legal fare. There is another count for money had and received, wherein the plaintiff seeks to recover back the said halfpenny from the said Company. To this summons and plaint the Company have pleaded as follows.—[His Lordship stated the nature of the defence.]—The plaintiff has demurred to this defence. The question here is, whether the Company has or has not a right to charge a passenger, in respect of a fraction of a mile, on a parliamentary train, conveying a passenger a distance exceeding two and under three miles? It is not alleged that this question is one of great consequence to Rice himself, but still it is of some importance to the Company, as to whether they are justified in charging two pence halfpenny upon this portion of their line, or should convey the passengers for two pence? That depends upon the construction of the 7 & 8 Vic., c. 85, s. 6, which is as follows:—“That whereas it is expedient to secure to the poorer class of travellers the means of travelling by Railway at moderate fares, and in carriages in which they may be protected from the weather, it is enacted that all passenger Railway Companies, which shall have been incorporated by any Act of the present Session, or which shall be hereafter incorporated, or which, by any Act of the present or any future Session, have obtained or shall obtain, directly or indirectly,

(a) 3 M. & Gr. 956.

(b) 13 M. & W. 127; S. C., 14 M. & W. 880.

(c) 1 M. & K. 162.

(d) 8 Sc., N. R., 870.

"any extension or amendment of the powers conferred on them respectively, by their previous Acts, or have been or shall be authorised to do any act unauthorised by the provisions of such previous Acts, shall, by means of one train at the least, to run along their Railway, from one end to the other of each trunk branch, &c., belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, &c., once at the least each way, on every week-day, except Christmas-day and Good Friday, &c., provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the Railway, under the obligations contained in their several Acts of Parliament, &c., &c.; and also subject to the following conditions," &c. One of these is:—"The fare or charge for each third-class passenger shall not exceed one penny for each mile travelled." The question is, whether the fare here charged exceeds one penny for every mile travelled? Now, the number of miles actually travelled is only two miles and a-half. Therefore, *prima facie* the fare does exceed the standard; for it exceeds the number of miles actually travelled; and then the question arises, whether we are at liberty to incorporate with that section a provision that, for a portion of a mile, the Company may charge a proportional part of the penny; for example, for two miles and a-half, a fare of two pence halfpenny? In order to give a strict construction to the Act, and favourable to the plaintiff, we have been referred by Mr. *Macartney* to a number of cases which establish this principle, that such enactments are to be construed most strictly against a public Company, as in the case of Acts of Parliament imposing taxes on the subject. It is not necessary to refer to these cases in detail; the principle is well established. The only question arising thereon is, with respect to the proper application of it; and upon this I need only observe that it seems to be applied more strongly in each successive case; so that, in point of fact, it lies upon the Company to show, either by express enactment or by necessary implication, that such a charge is authorised to be made. But it is said that the power of imposing this charge is incorporated by a former special Act into the general Act in ques-

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E. T. 1858. *Common Pleas.* tion, whereby the receipt of the fare by the Company was lawful.

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RAILWAY. The 1 & 2 W. 4, c. lxix, was the special Act of the Company, at the time of the passing of the general Act; and it is clear that at that time the Company had not come under the provisions of the latter, inasmuch as they were in full operation under the former Act. It has been truly stated that the 9 & 10 Vic., c. cxxiii, incorporated with itself the provisions of the 1 & 2 W. 4, c. lxix, and that the Company are therefore at liberty to refer to any provision in the 1 & 2 W. 4, bearing on the present case. By section 122 of the 1 & 2 W. 4, c. lxix, it is enacted that, "It shall be lawful for the said Company, from time to time, and at all times hereafter, to demand, receive and recover, to and for the use and benefit of the said Company, &c., any tolls not exceeding the following: that is to say, for every person passing in or upon any such carriage, for any distance not exceeding five miles, the sum of one shilling; for any distance not exceeding ten miles, the sum of one shilling and sixpence," &c., &c. Then follows section 123, which enacts, "That in all cases where there shall be a fraction of a mile in the distance, which any waggon, cart or other carriage shall pass upon the said Railway, the rates of tonnage or toll, which shall be demanded and taken, shall be after the rate of the number of quarters of a mile which the said waggon, &c., shall have passed; and where there shall be a fraction of a quarter of a mile, such fraction shall be deemed and considered as a full quarter of a mile." That section has no application to the case of passengers, but only to that of heavy goods. The only provision relating to passengers is that about the five miles.

The 9 & 10 Vic., c. cxxiii, incorporates the provisions of the 1 and 2 W. 4, c. lxix, and also those of the 8 & 9 Vic., cc. 18 & 20; and by the 31st section it is provided that:—"For articles or persons conveyed on the Railway for a less distance than six miles, the Company may demand tolls and charges as for six miles; for a fraction of a mile beyond six miles, or for any greater number of miles, the Company may demand tolls and charges as for one mile;" thus embodying, to a considerable extent, the terms of the former Act, but likewise expressly providing that the Company

may charge a proportional rate for every fraction of a mile, however short, over six miles, and, that for any distance under that limit, they may charge as for the full distance of six miles. But then this same Act of Parliament contains an express provision in s. 28, that nothing therein contained shall be held to exempt the Company from the provisions of the 7 & 8 Vic., c. 85, and the other general Acts. Accordingly, though this Act of Parliament authorises the Company, for each ordinary passenger train, to charge for the entire six miles, irrespective of the distance actually travelled, the same expressly provides that, for the parliamentary train, a charge shall be made of a penny for each distinct mile ; and thus the very Act upon which the Company relies only entitles them to charge for such parliamentary trains one penny per mile, and makes no provision for charging for a portion of a mile, as in the case of ordinary passenger trains. Therefore, we cannot entertain any doubt that, according to the ordinary rules of construction, the plaintiff has a right to maintain his action in the present case, and that the Company were not justified in making this charge. It was urged that if the plaintiff's construction be the correct one, this inconvenience would result, that parties would be entitled to travel free between certain stations upon the Dublin and Kingstown line, which do not amount to a mile in length. Upon that subject we offer no opinion ; but should such supposed inconvenience in fact exist, we cannot help it ; we merely decide that there is nothing in the Acts of Parliament to give the Company a right to charge, for conveyance in a parliamentary train, in respect of a distance exceeding two and less than three miles.

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This demurrer must therefore be allowed.

Demurrer allowed.

Macartney having applied to the Court to certify for full costs, under 16 & 17 Vic., c. 113, s. 243, and General Rule 103—

MONAHAN, C. J.

The section of the Act of Parliament to which you refer reduces the amount of the plaintiff's costs in case he recover under a cer-

E. T. 1858. tain amount, "unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for." It seems to contemplate that however small may be the sum recovered, in case the action has been brought to try a right to property, the same amount of costs are to be taxable as in ordinary cases. Then the 103rd Rule provides, that when the case is tried at Nisi Prius, the proper person, time and place for granting the application, is the presiding Judge at the conclusion of the Nisi Prius trial. This Rule does not apply to the case now before us, which must depend altogether upon the true construction of the Act. The parties must, in the first place, go before the Taxing-master, and take his opinion; and if either are then dissatisfied with his decision on the construction of that section, as relating to this case, it is competent for such party to come back to this Court, and have the matter considered upon motion to review the taxation of the costs; but we should not now interfere.*

* In consequence of the above decision, an Act of Parliament, 21 & 22 Vic., c. 75, was passed during last Session, and received the Royal assent on the 2nd of August 1858. It is entitled, "An Act to amend the Laws relating to Cheap Trains, and to restrain the exercise of certain powers by Canal Companies, being also Railway Companies."

The preamble recites the 7 & 8 Vic., c. 85; and s. 1 enacts that "When the distance travelled by any third class passenger by any train run in compliance with the provisions relating to cheap trains contained in the said Act of 7 and 8 Vic., c. 85, is a portion of a mile, and does not amount to one mile, the fare for such portion of a mile may be one penny; or when such distance amounts to one mile, or two or more miles, and a portion of another mile, the fare or charge for such portion of a mile, if the same amounts to or exceeds one half mile, may be one halfpenny; provided always, that for children of three years and upwards, but under twelve years of age, the fare or charge shall not exceed half the charge for an adult passenger."

Section 2:—"After the passing of this Act, no fare heretofore charged to or received from any third class passenger by any such train as aforesaid shall, in any proceedings to be hereafter instituted, be deemed to have exceeded the rate prescribed in such case by the said Act, 7 & 8 Vic., c. 85, if the same shall not have exceeded the rate of one farthing for each entire quarter of a mile travelled."

H. T. 1858.
CommonPleas.

KEYS

v.

BELFAST AND BALLYMENA RAILWAY COMPANY,
 THE LONDONDERRY AND COLERAINE RAILWAY CO. *Jan. 22, 23.*
 and WILLIAM M'CORMICK. *Feb. 1.*

T. T. 1858.
May 31.
June 1, 3, 10.

THIS was an action by the plaintiff against the Belfast and Ballymena Railway Company, the Londonderry and Coleraine Railway Company and William M'Cormick, who were sued as joint defendants. The summons and plaint, in substance, alleged that the defendants were possessed of, and common carriers upon, certain Railways in Ireland, to wit, a Railway from Belfast to Coleraine, A sued the B. and B. Railway Company, the L. and C. Railway Company, and W. M'C., jointly, as common carriers, for the loss of a travelling case, containing watches, which

he was carrying with him as personal luggage, he being a second-class passenger, travelling from B. to L., upon a through ticket. The defendants, amongst other defences, pleaded that they were entitled to the protection of the Carriers Acts (11 G. 4 and 1 W. 4, c. 68), and that the plaintiff had not made the requisite declaration, as to the contents of the parcel; to which the plaintiff replied that the loss was occasioned by the felony of the servants of the defendants. They also pleaded that the plaintiff was only entitled to carry personal luggage, and that the case in question did not come within that description; to which the plaintiff replied that its appearance was such as manifestly to indicate that it contained merchandise, to wit, watches, and not personal luggage, and that the defendants received it without objection or inquiry, and without demanding extra remuneration. It appeared at the trial that the case had been lost on the part of the journey between B. and L., which was owned exclusively by the L. and C. Railway Company; that plaintiff was prevented, by a servant of the L. and C. Company, from carrying the case in the same carriage with himself, on the pretence that the luggage-van was the proper place for its conveyance; that the interference of the servant was no part of his duty; that the case was not afterwards forthcoming, and that he subsequently denied all knowledge of the transaction. A question having been left to the jury, they found that a felony had been committed.—*Held*, that there was evidence to go to the jury, of a felonious taking of the goods.

The jury having found that the case manifestly contained merchandise, but not watches, a finding on the issue was directed to be entered for the plaintiff, the Court being of opinion that the particular description of merchandise was not the *gist* of the replication.

It appearing that W. M'C. was in no respect identified with the transaction, a verdict was directed in his favour. Upon a motion to arrest the judgment against the Railway Companies, in consequence of the acquittal of one of the co-defendants—*Held* that, although the action was partly in form *ex contractu*, yet, inasmuch as the substantial cause of action was the breach of an implied duty, the suit, notwithstanding the acquittal of one defendant, was maintainable against the others.

Held also, that the issuing of a through ticket was evidence of such a joint contract on the part of the several parties who shared in the price paid therefor, as would render them liable for misadventures upon any portion of the journey, notwithstanding that the place where the loss occurred was exclusively owned by some one of the parties, and that it was occasioned by the acts of his servants.

H. T. 1858. and a Railway from Coleraine to Londonderry; that the plaintiff, at
Common Pleas. the request of the defendants, became a second class passenger on the
said Railway, to be carried from Belfast to Londonderry, upon a cer-
tain through ticket given to the plaintiff by the defendants, for money
and reward, to wit, ten shillings; that one Thomas Conolly
was a servant upon and the guard of the Railway train by which
the defendants were conveying the plaintiff, and by which the
plaintiff was travelling upon the part of the said journey between
Coleraine and Londonderry; that said T. Conolly, acting as such
guard of the train by which the plaintiff was carried upon said
part of the journey between Coleraine and Londonderry, required
of the plaintiff to deliver to him, as such guard, a certain travelling-
case of the plaintiff, which the plaintiff was carrying with him upon
said journey, in order that the same might be carried in a certain
compartment of a carriage in said train, appropriated to the con-
veyance of the luggage and goods to be carried by said train;
that, in compliance with said requisition of said Conolly, so acting
as such guard, the plaintiff delivered to him the said travelling-
case, containing certain goods and chattels of the plaintiff, viz.,
188 gold watches, of the value of £1860, and ten silver watches,
of the value of £30, the whole amounting in value to £1890, which
case, and the watches therein contained, were to be safely carried
to the end of the said journey at Londonderry, and to be there
delivered to the plaintiff by the defendants, pursuant to their con-
tract and duty, as carriers in that behalf. That it was the duty
of defendants safely to carry said travelling-case and watches to
the end of said journey, and there to re-deliver the same to the said
plaintiff, so being such passenger as aforesaid. That plaintiff duly
paid his fare to defendants for being so carried, and duly performed
all things on his part, &c. (general averment of performance of all
conditions precedent). That Conolly, as such guard, took said goods
into his care and charge, on the portion of said journey between
Coleraine and Londonderry; and defendants, by the hands of said
guard, received the said goods, for the purpose of being conveyed
on said portion of said journey from Coleraine to Londonderry.
That the said train duly arrived at Londonderry, and that the

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plaintiff thereupon demanded of the defendants, by Conolly and other servants of the defendants, the said travelling-case and watches, and required of the defendants, by their said servants, to re-deliver same to plaintiff, according to the duty and contract of the defendants in that behalf; yet the defendants, not regarding their duty, refused so to do, &c.—Special damage.

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The second count was in detinue for the case and watches. The third count complained of the loss of the plaintiff's property through the breach of contract of the defendants, without reference to the acts of their servants; and also alleged that they received the goods in question, to be carried as part of plaintiff's luggage. The fourth count was in trover, for the conversion of the articles. The fifth count was founded upon an alleged contract between plaintiff and defendants, to take due and reasonable care in and about the conveyance and re-delivery of the goods, and complained that the same were not accordingly re-delivered to the plaintiff. The summons and plaint was indorsed with the particular descriptions of the watches in question.

The several defendants, having severed in their defences, pleaded as follows:—The Belfast and Ballymena Railway Company traversed the several material allegations in the summons and plaint; and they further pleaded to the first, third and fifth paragraphs, that the defendants were common carriers, on certain Railways, of passengers, for certain fares, and also of merchandises, at certain rates, &c.; that such Railway passengers were entitled to carry with them their personal luggage, free of charge in respect thereof, over and above the fares payable for themselves, but were not entitled to carry with them any merchandise, without paying for the carriage of the same as merchandise, of which the plaintiff had notice. That plaintiff, on the occasion in question, was a passenger on the said Railway, and took with him said travelling-case and its contents, as his personal luggage, and without paying any fare or sum of money for the carriage of the same; that said case and contents constituted merchandise, of which plaintiff had notice, but of which defendants had no notice or knowledge

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Common Pleas. were not received by defendants, as common carriers or otherwise.

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They further pleaded to the above paragraphs or counts of the summons and plaint, so far as the same related to the watches contained in said case, that said case and its contents were delivered to defendants, being common carriers by land, for hire, subsequently to the passing of the 11 G. 4, and 1 W. 4, c. 68 (an "Act for the more effectual protection of Mail Contractors, Mail-coach Proprietors and Common Carriers for hire"). That the said travelling-case contained watches, as mentioned, of a value exceeding £10, such watches being amongst the articles enumerated in the 1st section of the said statute; that, before and at the time of the delivery of the said case and its contents to the defendants as such carriers, a notice pursuant to said Act, and containing a statement of increased charges, to be paid for the carriage of such articles as aforesaid, including watches as aforesaid, was affixed, in legible characters, in a public and conspicuous part of the office, where the said case and goods were received by defendants, at the terminus of the said Belfast and Ballymena Railway Company at Belfast. That said case and goods were delivered to defendants to accompany the person of plaintiff, being then a passenger in certain public conveyances of defendants, at the terminus aforesaid; that the value of the said case and goods was not previously to, or at the time of the delivery, declared by the plaintiff, nor any other person, nor any increased charges, pursuant to the notice so affixed as aforesaid, or otherwise, in respect thereof, paid, or engaged or offered to be paid, by plaintiff or any other person; and that the non-delivery of the said goods complained of was by reason of the same being lost by defendants out of their possession, while the same were upon the said Railways of defendants, and in their possession, and under their care, as such carriers by land as aforesaid, and that, save as aforesaid, the said case and goods were not delivered to or received by the defendants as common carriers, or otherwise. They further pleaded a defence similar to the last, but omitting the allegation of the posting of the notice at the terminus.

The Londonderry and Coleraine Railway Company and the defendant M'Cormick severally pleaded defences, in substance corresponding with the preceding, with the additional averment in the defences under the Carriers Act, that the loss was accidental, and without the gross negligence of the defendants.

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The plaintiff replied to the above defences, traversing the averments of accidental loss; and, with respect to the first and second defences of the Londonderry and Coleraine Railway Company, the seventh and eighth defences of M'Cormick, and the fourteenth and fifteenth defences of the Belfast and Ballymena Railway Company (which were founded on the Carriers Act), he alleged that, whilst said goods were in the custody and possession of defendants, as common carriers, the same were feloniously stolen, taken and carried away, by a servant then in the employ of the defendants, the name of which servant is to the plaintiff unknown.

He further replied to the sixth, twelfth and thirteenth defences of the Belfast and Ballymena Railway Company, the third defence of the Londonderry and Coleraine Railway Company, and the ninth defence of M'Cormick; and, as to so much of the eighth and tenth defences of the Londonderry and Coleraine Railway Company as averred that said Company had no notice of the contents of the said case, and that the same were unknown to them, that said case was in appearance and in fact fit and proper for the conveyance of, and manifestly did contain, such merchandise, to wit, watches, and not personal luggage, as in the summons and plaint mentioned, and that there was not any improper concealment or fraud on the part of the plaintiff, touching said travelling-case; that defendants received said case and watches as a part of the personal luggage of the plaintiff, and without making any objection thereto, and without demanding any extra remuneration from the plaintiff for the carriage of such case and watches, and without making inquiry of the plaintiff touching the value of the contents of said case.

The defendants severally rejoined, denying the felony of their servant, and also alleging that said travelling-case was not in appearance and in fact fit and proper for the conveyance of, nor

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Upon these pleadings the following issues were settled:—First, Whether the said case and watches were lost, as in the thirteenth and fourteenth defences of the defendants, the Belfast and Ballymena Railway Company, the second defence of the defendants, the Londonderry and Coleraine Railway Company, and the eighth defence of William M'Cormick, alleged?

Second.—Whether the said case and watches were accidentally lost, and, if so, without the gross negligence of the defendants the Londonderry and Coleraine Railway Company, as in their first defence alleged?

Third.—Whether the said case and watches were accidentally lost, and, if so, without the gross neglect and negligence of the defendant William M'Cormick, as in the seventh defence alleged?

Fourth.—Whether the said case or package and watches were feloniously stolen, &c., by a servant then in the employment of the defendants, whilst the said case and watches were in the custody and possession of the defendants, as common carriers?

Fifth.—Whether the said case was, in appearance and in fact, fit and proper for, and manifestly did contain, merchandise, as in the last replication alleged?

Sixth.—Whether there was improper concealment on the part of the plaintiff, touching said case, as in the last rejoinder of the defendant William M'Cormick, and the Londonderry and Coleraine Railway Company, alleged?

Seventh.—Whether the defendants, or any and which of them, detained from the plaintiff the said case and watches?

Eighth.—Whether the defendants, or any or which of them, converted the said case and watches to their own use?

Ninth.—Whether the defendants, or any or which of them, were common carriers upon the said Railways, or any or which of them, as in the said plaint alleged?

Tenth.—Whether the plaintiff became a passenger on said Railways, and paid money for his said ticket to the defendants, or any of

which of them, and was conveyed by the defendants, or any and which of them, as in the plaint alleged?

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Eleventh.—Whether the plaintiff was required to deliver, and did deliver, to the said Thomas Conolly the said case and watches, as in the plaint alleged?

Twelfth.—Whether the defendants, or any and which of them, contracted with the plaintiff, as in the plaint alleged?

Thirteenth.—Whether the defendants, or any and which of them, were guilty of gross negligence, as in the said plaint alleged?

The action came on to be tried before MONAHAN, C. J., at the Sittings after Trinity Term 1857, when the following facts appeared in evidence:—The plaintiff was a commercial traveller, doing business for the eminent watch-making firm of Mottu of Geneva. On the 1st of December 1856, he took a second class through ticket at the station of the Belfast and Ballymena Railway Company at Belfast, as a passenger from Belfast to Derry, having with him a portmanteau, bag, hat-case, and two cases of watches, which he had brought in the omnibus from the hotel. On taking his ticket, a Railway porter carried the portmanteau from the omnibus; the plaintiff carried one case, and the boots from the hotel the other case, until he got his ticket. The plaintiff then deposited one under the seat of the carriage; the Railway porter pushed the other under the seat, but which, he could not recollect. He reached Coleraine at half-past seven o'clock that evening; saw the case taken out of the carriage, and subsequently saw it in the omnibus which conveyed him from the terminus of the Portrush Railway to the terminus of the Londonderry and Coleraine Railway. On arriving at the latter, he took both cases out of the omnibus, and went with them in his hands to the door of a second-class carriage; put the grey case into the carriage, and was in the act of putting in the black case (the loss of which was complained of), when a man named Thomas Conolly, a guard belonging to the Company, said that the luggage must be put into the van, and took up the black case. The plaintiff saw him put the case into the compartment of a carriage, and remonstrated with him, saying it was not the van, but Conolly said that it was the place for the luggage, and turned

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a lantern upon it. The train reached Derry at ten o'clock, and the plaintiff, having gone to the compartment, found that the door had been opened, and the case was missing. He asked Conolly for the case; Conolly replied, "What case?" The plaintiff said, "The case you put with my portmanteau before starting from Coleraine." Conolly said that he knew nothing of it, but that a person had gone forward with a case. A man went after him, but found that the case was not his. He taxed Conolly with knowing something of his case; Conolly said that if his case had been there he would have it. The plaintiff, the next day, went to Coleraine with a person named Williams, to seek for the case, but in vain. The plaintiff also proved the value of the contents of the case. Upon his cross-examination, it appeared that he never told Conolly of the value of the case; that there was another traveller in the omnibus, who got out at Derry; and that between Coleraine and Derry there had been several passengers in the carriages. Messrs. West and Waterhouse, silversmiths, were severally examined to prove the fitness of the case for the carriage of watches, and that its contents could be told from its weight and appearance. A Mr. Lane likewise proved that he travelled on the occasion in question, from Ballymena to Derry; that he recollects some one at Derry demanding a case or valise from Conolly, and saying to him, "This comes of your not letting me take the case with me at Coleraine." Conolly told him to look at the other luggage on the platform. Further evidence was given to show that plaintiff had at the time charged Conolly with having taken possession of the case, but the LORD CHIEF JUSTICE refused to admit evidence of the replies made by Conolly upon the several occasions.

The plaintiff's case having closed, the LORD CHIEF JUSTICE was called upon to nonsuit the plaintiff, on the ground that he had given no evidence of a felonious taking by any servant of the Company; but his Lordship refused to do so, reserving leave to enter a nonsuit, if the Court above should think that he ought to have done so. Counsel for each of the defendants then stated the cases of their several clients. Evidence was given on the part of M'Cormick to show that he was no further connected with the line of Railway in

question than as owner of the rolling stock on the Londonderry and Coleraine line, for which he received a weekly payment. Evidence was also given to show that the Belfast and Ballymena line had nothing to do with the Londonderry and Coleraine line; that the Portrush line, which was the connecting line below Ballymena and Coleraine, had nothing in common with the Belfast and Ballymena line, except the manager, whose duties to each Company were distinct and separately paid for; that 1ls. 8d. was the price of a through ticket from Belfast to Derry, which was distributed between the several Companies as follows:—3s. 9d. to the Belfast and Ballymena Company; 3s. 7d. to the Portrush Company; 4s. to the Londonderry and Coleraine Company, and 4d. to the omnibus proprietor; that the accounts were settled each week between the Companies, and the Belfast and Ballymena Company gave the others their proportions. Evidence was also given to show that the Companies had complied with the provisions of the Carriers Act (11 G. 4, and 1 W. 4, c. 68); that watches were subject to extra charge. It was also sworn to by officers of the Belfast and Ballymena Railway Company, that the case produced at the trial, the *fac simile* of the lost case, was such as would, by its appearance, pass as personal luggage, and that its weight would not suggest that it contained merchandise. The Londonderry and Coleraine Railway Company then examined Conolly, the guard, who swore that on the night in question he saw the plaintiff at Coleraine, witness being inside the compartment of the carriage where the luggage was placed. He saw the plaintiff with something in his hand, but got no luggage from him, nor had any communication with him that night, nor objected to his putting the case under the seat of the carriage, nor knew anything about the loss of the case. The luggage was handed into the carriage by a porter, upon which witness shut the door of the compartments. James M'Neill gave him the luggage. He did not remember showing plaintiff the luggage with a lamp; at Derry the door of the luggage-van was opened before he came up.

On cross-examination, the witness stated that he told M'Neill to put the passengers' luggage into the van; that he did not tell any person to take Keys' box from him; that he handed the luggage out

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of the Negroes in Italy: he did not see how the
army had to stop and said that he wished that the
army had given up; women will do the best. There is a
certainly "influence" in the air that there was
Italy before now. The chance of your taking the ship
is at the very top. * The whole Army something about it
should be like Italy at my suggestion to Germany. In
Italy, because we believe, nothing prevents him from going
but that the idea of the carriage is which he regards as
the wrongs the Negroes in Italy; he was born in the United
States.

The desire to have living relatives around the house
was strong. "I hope at the same time will make the case," he would
say, "I suppose we prefer to have it one of your houses...
it is safe there."

M. N. the porter, was then examined, and said that at night in question, at Cirencester, he put a performance of £1-
the luggage contents of the carriage where Connelly was. -
Key carrying a hat-case and another case; he saw Mr. Hall
as alleged in the carriage where the luggage was; at that time
often put passengers' luggage into the carriage. The woman
the only porter on duty that night.

The engine-driver was also called, to prove that he saw Conolly get out of the omnibus near the carriage where the luggage was put; saw the porter take the luggage, upon which Conolly got into the carriage, and subsequently got out to examine tickets. He had seen the passenger get out of the omnibus with a portmanteau, hat-case and umbrella.

Mr. Roe, the superintendent, also proved that the plaintiff came to his house that night, to complain of his loss; plaintiff said he thought that it was the guard who took it, though he would swear it: it was taken by some one like a porter in uniform.

Evidence on both sides having been closed, his Lordship reserved leave for the defendants to have a verdict entered for them on any ground appearing on the pleadings or evidence; told the jury that it was a question for them, upon the evidence, whether any of the defendants contracted to carry the plaintiff and his

luggage from Belfast to Derry; and that if they found that none of the defendants so contracted to carry him the whole way they should find a verdict for the defendants; that if there were several contracts by each for the different shares of the line, none of the defendants were liable. He also told the jury that, in his opinion, there was no evidence rendering M'Cormick liable; that it was for the jury to say whether the goods were lost or stolen by a servant of the defendants: and on the issue as to the appearance of the case, the **Lord Chief Justice** commented on the evidence of the plaintiff and the other witnesses. The jury found, upon the first, second, third, sixth, seventh and eighth issues, in the negative; upon the fourth, tenth and eleventh issues, in the affirmative. On the fifth issue the jury found specially that the case was, in appearance and in fact, fit and proper for, and manifestly did contain, certain merchandise, not personal luggage; but the particular sort of merchandise it so contained did not so manifestly appear, though, from the evidence, it now appears that it did contain watches, and it so manifestly appeared, both at Belfast and Coleraine, when delivered to the servants of the Companies. Upon the ninth issue they found that both Railway Companies were common carriers, but not William M'Cormick. Upon the twelfth they found that a contract with the plaintiff, to carry him from Belfast to Derry, was entered into at Belfast, and binding on the Railway Companies. As to the thirteenth issue, the jury were discharged from finding. The jury assessed the damages at £1282.

In the following Michaelmas Term, *Whiteside*, on behalf of the Belfast and Ballymena Railway Company, obtained a conditional order to set the verdict aside, and to enter a nonsuit for the defendants, upon the ground that, at the close of the plaintiff's case, there was no evidence to go to the jury of the felonious taking of his case by any of the servants of the Belfast and Ballymena Railway Company, or by any other servant of any of the other defendants; and that judgment should be entered up for the defendants, on the ground that the jury found for all the defendants upon all the paragraphs of the summons and plaint laid in trover and detinue; and as to all the residue of the plaint, founded upon

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H. T. 1858. the alleged joint contract of the three defendants, the jury have found for one of the defendants, Mr. McCormick ; and also upon the ground that, by their finding upon the fifth issue, the jury have in substance, found a verdict in favour of the Belfast and Ballymena Railway Company ; and that the verdict should be set aside and a new trial had, upon the ground that it is not found by the jury that the defendants, or any of them, contracted with the plaintiff to carry the said plaintiff's case from Belfast to Londonderry, or at all ; and upon the ground that there was no evidence to sustain the averment in the plaint that these defendants were common carriers from Belfast to Londonderry ; and on the ground that the finding of the jury on all the issues sent to them, save the seventh and eighth, which were found for the defendant, are against evidence, and against the weight of evidence ; and on the ground that the findings of the jury, particularly on the fifth, ninth and twelfth issues, are ambiguous, and insufficient to decide the case between the parties ; or that the judgment for the plaintiff should be arrested or should be entered for the defendants, *non obstante veredicto*, upon the ground that the said Belfast and Belfast and Ballymena Railway Company, by their twelfth defence, pleaded that they had no notice or knowledge that the said case of the plaintiff contained merchandise ; and that plaintiff, by his replication to that defence, did not deny, and by not denying, admits the fact to be so, and that by reason of such the replication raised an issue altogether immaterial.

Joy obtained a similar rule on behalf of the Londonderry and Coleraine Railway Company.

Cause was afterwards shown on behalf of the plaintiff, against making absolute the foregoing rules, by—

Fitzgibbon and *Macdonogh* (with whom was *D. C. Heron*).

Lynch and *May* appeared in support of the conditional order obtained by the Belfast and Ballymena Railway Company.

Joy and James Hamilton, on behalf of the conditional order of H. T. 1858.
the Londonderry and Coleraine Railway Company.

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McCausland appeared for William McCormick.

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The following cases were cited during the course of the several arguments, the nature of which will sufficiently appear from the judgment of the Court:—

Govett v. Radnidge (a); *Muschamp v. Lancaster and Preston Railway Co.* (b); *Scothorn v. South Staffordshire Railway Co.* (c); *Machu v. London and South-Western Railway Co.* (d); *Collins v. Bristol and Exeter Railway Co.* (e); *Gibbon v. Paynton* (f); *Sleat v. Fagg* (g); *Pozzi v. Shipton* (h); *Bretherton v. Wood* (i); *Ansell v. Waterhouse* (k); *Wilby v. West Cornwall Railway Co.* (l); *Great Northern Railway Co. v. Rimmell* (m); *Finucane v. Small* (n); *Weall v. King* (o); *Richards v. London, Brighton and South Coast Railway Co.* (p); *Butcher v. London and South-Western Railway Co.* (q); *Lopez v. De Tastet* (r); *Wheelton v. Hardisty* (s); *Avery v. Bowden* (t); *Watson v. Ambergate Railway Co.* (u); *Fowler v. Great Western Railway Co.* (v); *Great Northern Railway v. Shepherd* (w); *Crouch v. London and North-Western Railway Co.* (x); *Coope v. Eyre* (y).

Cur. ad. vult.

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| (a) 3 East, 62. | (b) 8 M. & W. 421. |
| (c) 8 Ex. 341. | (d) 2 Ex. 415. |
| (e) 11 Ex. 791; S. C., in Error, 1 H. & N., 517. | |
| (f) 4 Burr. 2298. | (g) 5 B. & Al. 342. |
| (h) 8 Ad. & El. 963. | (i) 3 Bro. & Bing. 54. |
| (k) 6 M. & S. 365. | (l) 2 H. & N. 703. |
| (m) 18 C. B. 575. | (n) 1 Esp. 315. |
| (o) 12 East, 452. | (p) 7 C. B. 839. |
| (q) 16 C. B. 13. | (r) 1 Bro. & Bing. 538. |
| (s) 3 Jur., N. S., 1173. | (t) 6 Ell. & Bl. 973. |
| (u) 15 Jur. 449. | (v) 7 Ex. 699. |
| (w) 8 Ex. 39. | (x) 14 C. B. 255. |
| (y) 1 H. & Bl. 37. | |

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MONAHAN, C. J., now delivered the judgment of the Court.

This case comes before us on a motion to change the verdict upon certain issues, pursuant to leave reserved, or for a new trial. The case was tried before me at the Sittings after last Trinity Term, and it has been argued before us upon two several occasions. We do not regret the time occupied in the discussion, inasmuch as we have received much assistance from the Bar, and we are at length able to give a judgment satisfactory, at least, to our own minds. There is this peculiarity in the summons and plaint, which consists of several counts, that the first count appears to have been framed according to the old forms in actions on the case as distinguished from *assumpsit*. The third and last counts may be regarded as framed in *assumpsit*. There are two other counts respectively in trover and in detinue.—[His Lordship then stated the pleadings].—In that state of the pleadings, issues were settled before me in Chamber, amounting to twelve in number. The case subsequently came on for trial, and the facts which appeared in evidence were shortly these:—Mr. Keys, the plaintiff in this action, was the traveller of the eminent Swiss house of Mottu, watch manufacturers, of Geneva; and having in his possession two cases of watches, of considerable value, he purchased in Belfast a second class ticket, to take him from Belfast to Londonderry. It also appeared at the trial, that the Belfast and Ballymena Railway Company were the owners of the line of Railway between those two places; that another Company, not defendants in the action, were owners of the line between Ballymena and Coleraine; that the Railway between that place and Londonderry belonged to a third Company, defendants in this action, and that an intervening space between the two latter lines of Railway was traversed by an omnibus, by which the passengers were conveyed from the terminus of one station to that of the other, over the River Bann. The fare for the entire journey was about eleven shillings, subsequently divided between the respective Railway Companies, in proportion to the length of each line, six pence being given to the omnibus proprietor for the conveyance of each passenger for the short interval between Coleraine and the terminus of the Londonderry line. It appeared by the evidence of

Mr. Keys, that having the two packages or cases of watches with him, he took them safely over the lines of two of the Companies; that is, from Belfast to Coleraine, and subsequently lost one between Coleraine and Londonderry, upon the line of the Coleraine and Londonderry Company, one of the defendants. The question then arose whether in an action, framed as this was, there was any case to go to the jury against all or any of the defendants? It was first insisted by all the defendants that there was no case against *any*; for that the liability of each, as common carriers, was limited to the extent of their respective lines. If such were the case, no doubt, the plaintiff should fail in the action, for the journey described in the summons and plaint, in respect of which the defendants were charged as common carriers, was from Belfast to Londonderry. I held that there was some evidence to go to the jury as against the two Railway Companies, but that there was no evidence as against William M'Cormick; for although his name appeared on some of the rolling stock, it was proved that he had no control over it. I left the question to the jury, as a matter of fact, whether the contract with Keys was one entire contract to carry him the entire journey from Belfast to Londonderry, or three separate contracts by each Company to carry him on their respective lines, and if they found it to be one entire contract, whether such contract was entered into with him by all the Companies, or only by the Company at whose terminus he bought his through ticket? The jury found that the three Companies had entered into a joint or entire contract to carry the plaintiff the whole way. I then reserved liberty for the defendants to move to have the verdict entered for both, in case I was wrong in leaving the question to the jury at all; or in case I ought to have directed a verdict for either Company, upon the ground that there was no evidence to go to the jury against them individually, then that a verdict should be entered for such defendant. During the argument on this part of the case, no question was made that if a man purchase a through ticket, though from the clerk of a Railway Company which is the owner of only a small portion of the line, a jury may arrive at the conclusion that a

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The first case which bears upon the subject is that of *Musgrave v. The Lancaster and Preston Railway Co.* (a). In that case, which was not an action of *assumpsit*, but upon the case, as against a common carrier, a parcel had been delivered at Lancaster to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it would better be paid by the person to whom it was directed, on receipt of it. The Company were known to be proprietors of the line only as far as Preston, where the Railway unites with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel was lost after it had been forwarded from Preston. The Judge told the jury, in his charge, that where a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, that was *prima facie* evidence of an undertaking, on his part, to carry the parcel to the place to which it was directed; and that the same rule applied, although that place were beyond the limits within which, in general, he professed to carry on the trade of a carrier. The jury having found a verdict for the plaintiff, and the question having arisen as to whether that direction was right, it was held that there was evidence to go to the jury of the existence of such a contract, and that the Judge was accordingly right in leaving that question to the jury. That case, therefore, decided this proposition, that where one Railway Company sells a through ticket, and takes a parcel directed to a person far beyond the limits of its own line, the jury may find the existence of a contract by them to carry beyond their own line; it is also important as an authority for the proposition, that that Company may not only be sued in *assumpsit* for the breach of contract, but also in an action on the case, for the violation of their Common Law duty, as common carriers; and, therefore, if this action had been brought against the Belfast and Ballymena Railway Company

(a) 8 M. & W. 421.

alone, that case would have been exactly in point to prove that, in consequence of the through ticket having been purchased by the plaintiff from them at the commencement of the journey, they were rendered responsible for whatever occurred during its entire progress; and so a great portion of the argument, during the new trial motion, was to prove that, though the loss occurred at the later stage of the journey, the plaintiff should have looked exclusively to the Company with whom he dealt at the commencement of the journey. But that case only goes to this extent, that the plaintiff *might* have sued the Belfast and Ballymena Company alone, and that he is entitled to retain his verdict against them, at least, provided that the acquittal of the other defendants does not amount in point of law to an acquittal of all. That case was followed by another, *Scothorn v. The South Staffordshire Railway Co.* (a). The plaintiffs proved the delivery, at the station of the Company, of certain goods, addressed "To the East India Docks, London," and paid one sum for their carriage the whole distance. The Company, which owned only a small portion of the line, forwarded the goods on to London; but it appeared that the plaintiffs, before the goods arrived at their destination, directed a clerk at the London station of the London and North-Western Railway Company, over whose line the goods had to travel, to forward them to another place, which he forgot to do, and the goods went to their original destination, whereby the plaintiffs lost them. The question there was, whether the South Staffordshire Company, to which the goods had been originally delivered, were responsible for loss of the goods by the omission of the clerk, and it was held that they were so, inasmuch as he was to be considered as their agent for that purpose. In that case the action was brought in *assumpsit*, and not in *case*, showing that, in the same state of facts, a party has power to sue either in *assumpsit* or *case*, provided the loss is the result of a breach of the Common Law duty of a carrier, in addition to being a breach of contract. Two points were there decided; first, that the defendants were primarily liable, in consequence of the sale of a through ticket; secondly, that a man who is the servant of another Company was to be deemed to be the servant of the defendants, for

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(a) 8 Ex. R. 341.

T. T. 1858. the purpose of that particular journey, and for the taking of instructions for the countermand of the delivery of parcels. Then follows a case substantially to the same effect, *Wilby v. The West Cornwall Railway Co.* (a). In that case a parcel was delivered at Penzance, to the West Cornwall Railway Company, addressed to a person at Wolverhampton, "per first steamer from Hayle." The Company's line extended only for a short distance. Before the goods could reach their destination at Wolverhampton, they had to travel by sea and by several other lines of Railways; nevertheless, the Company was held responsible for an injury which the goods sustained on board the steam-boat. That was an action on the case; but it is to be observed that, in this and other cases, no Judge has decided the question of liability at all. They only decided that in each of those cases there was evidence to go to the jury of a contract for the entire journey, by the Company who sold the ticket; and that the jury, and not the Court, were to say whether such contract was in fact entered into. We are all of opinion, without entertaining any doubt, that the course which I took at the trial upon this part of the case, was right; that, in the first place, there was evidence of an entire contract, inasmuch as the idea that a man who takes a single through ticket from Belfast to Londonderry thereby entered into four several contracts with four several persons, including the omnibus proprietor, is absurd; there also being evidence that the money paid for the through ticket was distributed among all the Railway Companies, and the fact of each Company recognising the through ticket, as entitling the holder to be carried on their line, was some evidence that the clerk who issued the ticket was the agent or servant of all the Companies; and, therefore, I was bound to leave the question to the jury as I did, leaving to them to decide whether a contract for the entire journey was or was not entered into by all or only one of the Railway Companies.

We do not decide that a case might not have been made, on behalf of the Coleraine and Londonderry Company, to show that there had been in fact a sub-contract entered into with the Belfast and Ballymena Company, to carry their passengers, so that they

(a) 2 Exch., N. S., 703.

would not be liable immediately to the passenger. All that we say is, that there was evidence to go to the jury of an entire contract by both Companies. There is no ground, therefore, for entering up a verdict upon these issues, for both or either of these defendants. Next comes the question, most pressed by Mr. *Joy* and Mr. *Hamilton*, whether, assuming that I am right so far, the fact of the finding in favour of one of the defendants, M'Cormick, that he was not a common carrier, and that he did not enter into the contract, did not entitle the other defendants to similar findings in their favour; or whether, though a judgment must, on the present findings, be entered in favour of the defendant M'Cormick, as the record is framed, judgment can be entered for the plaintiff against the other defendants, or whether judgment should not be entered for them as in the ordinary case of a verdict being found in favour of one of several defendants in the action of *assumpsit*? Upon this portion of the case, Mr. *Hamilton* referred us to cases which required some consideration. It must be borne in mind, that the first count is, substantially, a count in *case*, for a violation of duty as common carriers. We have been referred to the case of *Weall v. King and another* (a). That was an action brought against two defendants, for deceit, it being alleged that, in violation of their duty, they sold to the plaintiff certain sheep, which they knew to be unsound. It turned out at the trial, that the sheep were the property of only one of the defendants; and the question then arose, whether that, being an action upon the case, it could be supported against one defendant? but Lord Ellenborough held that it could not, inasmuch as there was a joint contract stated in the declaration, which should have been proved as laid, instead of which a separate contract was established; and that in consequence of this fatal variance, the action was not maintainable. Upon the same principle, the case of *Lopez v. De Tastet* (b) was decided, which was an action on the case, against an agent, for misconduct; but notwithstanding that it was, in form, an action of tort, yet being founded upon an express contract, a variance between the contract alleged and that proved was held to be fatal. The argument was that, generally speaking,

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(a) 12 East, 452.

(b) 1 Bro. & Bing. 533.

T. T. 1858. in actions of tort, the plaintiff may have a verdict against some of
Common Pleas. the defendants, while others of them may be acquitted ; and accordingly, the plaintiffs wanted to apply that rule to their respective cases ; but the King's Bench in one case, and the Common Pleas in the other, decided that though the action was, in form, one on the *case*, the general rule did not apply, for that the action had no other foundation save a contract, and the injury complained of was its fraudulent violation ; and consequently, the Courts in both cases held, that the acquittal of one defendant must involve the acquittal of the other. Mr. *Joy* and Mr. *Hamilton* argued (I refer particularly to their arguments as having been more recent than the arguments addressed to us on behalf of the other Company), that this action was, in fact, founded upon a contract : that is true to some extent, but not entirely. It was so, because their entering into a contract showed that they were common carriers ; but then it was not upon this contract that the action in the first count or paragraph of the summons and plaint was founded, but upon a breach of their duty as such common carriers. To illustrate this distinction between a contract being the foundation of the action or not being so, it may be observed that the fact of the parties having acted as common carriers, and as such having received the plaintiff's goods, was capable of proof, irrespective of evidence of a contract, in which case it is clear that a verdict for one defendant could not operate to get rid of the liability of the others. That was decided in the case of *Pozzi v. Shipton* (a). There the parties were sued as common carriers, and it was doubtful on the face of the declaration whether it was a count in *assumpsit* or *case* ; a verdict was found against one and in favour of another defendant. The question before the Court was whether the action was *case* or *assumpsit*? They decided that, by doing some violence to the language, they would read the count as in *case*. That case was decided before parties had liberty, as at present, of framing counts in both forms ; and hence the Court were astute to read the count as one in *case*, founded upon the Common Law liability of carriers, so as to prevent the acquittal of one defendant barring the action against the other. The fact of parties being

(a) 8 Ad. & El. 963.

common carriers is capable of being proved in various ways:—for example; it may be by showing that they were so, in point of fact; secondly, that they held themselves out to the world as such; lastly, by proving an express contract to carry by a party, who thereby becomes liable as a carrier, though he has no control over the servants employed along the whole extent of the line. We therefore are of opinion that the acquittal of Mr. M'Cormick, one of the defendants, can only relieve himself, and not his co-defendants, from liability to the cause of action contained in the first paragraph of the summons and plaint. Another point of importance which was made in this case was in reference to the allegation, in the replications to the pleas relying upon the Carriers Act, that these goods were feloniously stolen by a servant of the Company. It has been said, that there was not sufficient evidence of such stealing. Upon that point we have been referred to *The Great Northern Railway v. Rimmell* (a), and to *Avery v. Bowden* (b). The first case was one in which a similar defence to that here was pleaded. There the Court of Common Pleas were not satisfied that there was evidence to go to the jury, but, under the particular circumstances of the case, they held that there was no sufficient evidence; and an observation appears to have been made, that it was not enough to give a *scintilla* of evidence of felony, but that it should have been such as would have justified a conviction. The case of *Avery v. Bowden* lays down more clearly than that in the Common Pleas the distinction which appears to me to be the true one; namely, that where, by the consent of the parties, the evidence is submitted to the Court, and that in the event of their regarding it as insufficient, the verdict is to be set aside, such case is clearly distinguishable from the case of a bill of exceptions, "evidence" in the former case meaning "reasonable evidence;" and there the Lord Chief Justice lays down this rule, that a *scintilla* of evidence is not sufficient. This point we are not bound to concede in the present case, for we entertain no doubt that, at the close of the plaintiff's case, there was a great deal more than a *scintilla* of evidence. I would, in fact, say a great deal of evidence was given to justify the jury in finding

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T. T. 1858. the truth of the replication. The evidence amounted to this:—This
CommonPleas. gentleman, Mr. Keys, the plaintiff (the truth of whose evidence I
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RAILWAY. must assume, as the jury acted upon it, as of a faithful witness) had with him two travelling cases; one of these he put into the carriage, in which he was about to travel, under the seat; and he was in the act of putting in the other, when Conolly, the guard of the Londonderry and Coleraine Railway Company, interfered, and insisted that the package should not go there, but into the luggage van. He did so, not in the discharge of his duty as a servant of the Company, there being no rule in existence to prohibit passengers carrying small parcels of this description in the carriages with them, and no such objection being usually made; on the contrary, passengers being rather encouraged than otherwise to do so, as they would thereby look after their own parcels, of a description more liable to depredation than parcels of a larger description. All that appeared on the plaintiff's case; a case containing valuable property, indicated by the weight of the contents, taken from the plaintiff, without orders, by a servant of the Company, and not being afterwards forthcoming. I confess that, had I been trying this man for the felony, I would not have withdrawn the case from the jury. Even had the case rested here, it might have been arguable; but, when this man Conolly was produced by the Company, whose servant he was, as their witness, he gave an account of the transaction, denying everything that had been deposed to by the other witnesses. I should, indeed, have been very much surprised if the jury had come to any other conclusion, with respect to that, than they arrived at. With respect to the last portion of the case, as to the allegation that by the rule of the Company, which was known to the plaintiff, he was at liberty to carry merchandise with him as personal luggage, no doubt such was the general rule, that if a man took merchandise as a part of his luggage, the Company would not be responsible for its safety. Then the plaintiff filed a replication, for the purpose of bringing the case within the rule laid down by the Court of Exchequer in the *Great Northern Railway Company v. Shepherd* (a), where Parke, B., said, "If indeed they had notice, or

(a) Ex. R. 39.

" might have suspected, from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them, but the case finds that they had no notice of what the packages contained."

The substance of that *dictum* is, that though a passenger is only entitled to carry personal luggage with him, and that if he carry merchandise and conceal it from the Company, he has no claim for compensation in case of loss; yet if he manifestly carry merchandise, as luggage, the Company are responsible for what he so takes, if they do not object at the time.

The finding of the jury, upon this issue, was that the package manifestly contained merchandise, but not so as to denote the particular description of merchandise. One point of the discussion was whether the finding respecting *merchandise* was equivalent to one regarding *watches*? and it was argued that there being no finding of the latter kind, the finding upon the issue should be regarded as one for the defendants. During the argument, we thought that, in order to ascertain how the issue should be entered, we should look to the replication, for the purpose of seeing whether it was watches or merchandise which were therein alleged to have been taken with the knowledge of the Company. Having done so, we are of the opinion, in conformity with the judgment of Parke, B., that notice of the carrying of *merchandise* by the plaintiff was sufficient, and that the substance of the issue, as explained by the replication, was, whether the case manifestly contained *merchandise*? We will therefore enter this finding for the plaintiff, but substantially as found by the jury, so that the defendant, if so advised, may have the opportunity of taking the opinion of a Court of Error. Upon the whole of the case, therefore, having considered it with all the attention in our power, we are of opinion that this verdict must stand.

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Cause shown allowed.

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Exchequer Chamber.*

T. BRERETON and S. STONEY v. M. and R. TUOHEY.

May 26.

A covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest; and, therefore, if his assignee acquires the inheritance, it is not bound by the covenant.

The order of the Court of Chancery for the execution of a fee-farm grant by a tenant for life, obtained in a petition proceeding against him, under the Renewable Leasehold Conversion Act, gives only the same effect to the grant as it would have had if made voluntarily by the same person, and is not conclusive against the remainderman (not being a party to the proceedings), as to the right of renewal.

H., being entitled to lands, under a lease, dated in 1769, for lives renewable, and also of other lands, under a lease of 1772, for two lives only, made a sub-lease in 1788 to K., of both the lands, at a bulk rent, for three lives, with a covenant for perpetual renewal. K.'s interest afterwards vested in T. H.'s interest subsequently came to R., who acquired also the reversion in fee in both the lands, and settled them upon himself for life, remainder to his son S. The several lives having expired, a fee-farm grant was afterwards made of all the lands by R. to T., under an order of the Master of the Rolls, upon a petition filed for that purpose against R., under the Leasehold Conversion Act. To this proceeding S. was not made a party. R. having died, S. now brought an ejectment.—*Held* (reversing the decision of the Exchequer), first, that S. was not bound by the covenant for renewal in the lease of 1788, so as to preclude him from recovering the lands comprised in the lease of 1772; and secondly, that the decision of the Master of the Rolls did not conclude him as to the existence of the right of renewal of those lands.

* Before LEFBOY, C. J., MONAHAN, C. J., CRAMPTON, BALL, CHRISTIAN and O'BRIEN, JJ.

owner in fee) demised to John Hill the mill, &c., of Ballyknockane, with the parcel of land usually held therewith, containing three acres, for three lives, with a covenant for perpetual renewal, on payment of a fine of one barrel of oats, or 5s. 5d. sterling. By another lease, dated the 5th of November 1772, the same T. Johnson demised to the same J. Hill another piece of ground adjoining that comprised in the former lease, containing 1a. 2r. 23p., for two lives, but without any covenant for renewal. By deed, dated the 25th of March 1788, William Hill (the eldest son and devisee of said John Hill, the lessee, and in whom the interest under said lease was vested), demised to Thomas Kent all that part of the lands of Ballyknockane, containing six acres or thereabouts, for three lives, with a covenant for perpetual renewal, on the payment of a pepper-corn fine, at one entire rent greater than the rents reserved by both of the said original leases; and in this deed, which did not contain any recitals of the lessor's title, was contained the following clause:—"And the said Thomas Kent doth hereby subject himself to all covenants and clauses contained in the original lease of the hereby demised premises, made by Thomas Johnson to the late John Hill, deceased."

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By indenture, dated the 5th of December 1793, William Hill conveyed all his interest in the premises under the said two original leases of 1769 and 1772 to Thomas Stoney. The title of said Thomas Johnson to the reversion in fee was then regularly deduced, and proved to have become vested in the same Thomas Stoney, in the year 1802. In the year 1809, the surviving life in the lease of the 5th of November 1772 expired. Thomas Stoney having thus acquired both the interest of the mesne lessee and the reversion in fee, by a settlement, dated the 13th of February 1819, executed on the marriage of his son the Rev. Ralph Stoney, conveyed all his estate and interest in the premises to the plaintiff (Brereton), as trustee, in trust for Ralph Stoney, for life, and, after his decease, for the use of the sons of the marriage, as Ralph should appoint; and in default of appointment, to the first son of the marriage, in tail male. It was also proved that the interest of the said Thomas Kent became vested in Jeremiah Tuohey, the

T. T. 1858. father of the defendants, and after his death became vested in
Esch. Cham. the defendants ; and further, that by deed, dated the 30th of
BRERETON April 1830, made between said Ralph Stoney, of one part, and
v. said Jeremiah Tuohey, of the other part, reciting the said indenture
TUOHEY. of lease of the 25th of March 1788, and the said clause therein
 whereby the said Thomas Kent subjected himself to the covenants
 in the original lease, and that the fee and inheritance of said
 premises, and also the interest aforesaid of William Hill (the
 lessor) in and to the same, "under said lease," were then vested
 in said Ralph Stoney, and that all the estate of Thomas Kent
 was then vested in said Jeremiah Tuohey ; the said Ralph Stoney,
 in pursuance of the covenants for renewal contained in the said
 indenture, and in consideration of the renewal fine of five guineas
 on each life, renewed the said premises for three lives therein
 named. It was also proved that, in 1855, a petition in Chancery,
 under the Renewable Leasehold Conversion Act, was presented
 on behalf of the Tuoheys, against the said Ralph Stoney, praying
 that he might be decreed to execute a fee-farm grant of the
 said lands demised by the lease of the 25th of March 1788,
 pursuant to the covenant for renewal therein contained.

The right to a renewal, as to the portion of the lands for which
 defence was taken by Rose Tuohey, was disputed by Ralph Stoney,
 who endeavoured to show that the lease or renewal of 1830 was
 the result of an arrangement for that purpose between him and
 Tuohey, and not as a matter of right. The proceedings on this
 petition were given in evidence ; and, in particular, an account of
 what took place on the hearing of the petition before the Master
 of the Rolls was proved as follows, by the defendant's attorney :—
 That Mr. Sadleir Stoney (who was the eldest son of said Ralph
 Stoney, and entitled, under the limitations in said settlement, in
 default of appointment by his father, and a plaintiff in the present
 case) appeared before the Master of the Rolls as the Counsel of
 the said Ralph Stoney, and at first resisted the petition altogether,
 then contended that the grant, if made at all, should be in pursuance
 of the renewal of 1830. The Master of the Rolls expressed his
 strongest disapproval of the course pursued by the respondent,

and said he would take care that such proceedings should be taken as would bind the remaindermen, the parties necessary to be bound by the fee-farm grant. The Master of the Rolls was not about to pronounce an order, but said he would consider the order to be made. and said, if necessary, he would direct a cause petition to be filed to bind the remaindermen. Sadleir Stoney then stated to the Court, that in that case the respondent would consent to a fee-farm grant, on the terms of the original lease of 1788.

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An order was accordingly made by the Master of the Rolls, on the 29th of February 1856, for the execution of a fee-farm grant. On the 18th of March 1856, the plaintiff Sadleir Stoney, with the other sons of said Ralph Stoney, served the defendants with a notice, stating that the said Ralph Stoney had no power to make the said grant in perpetuity of the said lands, except of the said portion comprised in the lease of the 4th of November 1769, and requiring them (the defendants) to procure a grant of same premises only; and stating that, in the event of their non-compliance, use would be made of that notice to deprive them of any right they might have to a grant in perpetuity thereof; and that on becoming entitled, on the death of Ralph Stoney, they (the Stoneys) would take such proceedings to evict the defendants as they might be advised.

On the 10th of May, a fee-farm was duly executed to the defendants by the said Ralph Stoney, of all the premises, pursuant to the said Rolls order; and in this fee-farm grant the lease of 1788 was recited as having been made subject to the covenants and clauses contained "in the original lease."

It was also proved that Ralph Stoney had died in July 1856, without making any appointment of these lands; and the present ejectionment was thereupon brought by the said trustee of the settlement (Brereton) and the said Sadleir Stoney, the eldest son of Ralph.

Counsel for the defendant thereupon called upon the learned Judge to direct a verdict for said defendant Rose Tuohay, contending that Thomas Stoney, and all parties claiming through him, were bound to give effect to the covenant for perpetual renewal in the lease of 25th of March 1778; and also that, upon the evidence, the fee-farm grant had conferred upon her an indefeasible title, which

- T. T. 1858.** could not be questioned in this Court, or by this proceeding; but
Exch. Chan. his Lordship declined to do so, and directed for the plaintiff, but
BRERETTON reserved liberty to move the Court to have said verdict turned
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TUOHY. into a verdict for the said defendant Rose, if the Court above should
be of opinion that she was so entitled.

The case having come on for argument before the Court of Exchequer, it was contended that the plaintiff Stoney was not bound by the proceedings before the Master of the Rolls, or the grant made in pursuance thereof, and that he therefore was entitled to the possession of all the premises, save those charged in the lease of 1769. The Court below (Richards, B., dissenting) gave judgment for the defendant, setting aside the verdict had; and, from this, an appeal was now brought.

Brewster (with him *Rolleston* and *Ryan*), for the plaintiff.

The Renewable Leasehold Conversion Act does not give the Court of Chancery a power to confer an indefeasible title; and the grantor here was not a competent person to make that grant, within the meaning of the Act, as he was only tenant for life, and could not bind the remainderman, who, by his notice of the 18th of March, expressly disavows his consent to the grant. There was no estoppel here by the renewal of 1830, for an interest passed. To hold this Act conclusive could only be done by implication; and lands cannot become vested by implication from the words of an Act of Parliament: *Annesley v. Dixon* (*a*).

R. Armstrong and *W. Smith*, for the defendants.

The lease of 1772 merged in the reversion subsequently acquired by Thomas Stoney, who thereupon became bound to renew, there being no other person to give effect to the covenant in the deed of 1788. That covenant was for perpetual renewal, as construed by the acts of the parties here; and covenants originally imperfect may be construed and given effect to by the subsequent acts of the parties: *Taylor v. Stibbert* (*b*); *Shannon v. Bradstreet* (*c*); *Earl of*

(*a*) *Holt*, 372.

(*b*) 2 *Ves. jun.* 437.

(*c*) 1 *Sch. & Lef.* 73.

*Shelburne v. Biddulph (a); Beere v. Cavendish (b); Lysaght v. T. T. 1858.
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This is an attempt to re-agitate a matter which has been already adjudicated upon by the Master of the Rolls, who had competent jurisdiction under the late Act. His decree, being a decision on a matter necessary for his jurisdiction, namely, as to the existence of a covenant for perpetual renewal, must be taken to be conclusive; and it was on this point that the Chief Baron mainly rested his judgment in the Court below: *Brittain v. Kinnaird (g)*. The Act is remedial, and gives the tenant for life additional powers as to binding the inheritance. He is to be regarded in the light of a parliamentary donee of a power to renew.—[MONAHAN, C. J. Do you contend that, if the person who executed this grant had done so without the intervention of the Court of Chancery, the defendants would have had any *locus standi* here?]—The argument need not be pushed that length, as the Act is distinct in its provisions with respect to the cases where the Court of Chancery is resorted to. In the construction of statutes, the grammatical sense of the words is to be adhered to: *Warburton v. Ivie (h)*. *Ruledge v. Flood (i)* was decided on the sections of the Incumbered Estates Act which give jurisdiction, not on those which make the conveyance final. The Renewable Leasehold Conversion Act was passed in order to provide a cheap mode of establishing the right to a renewal when a covenant for that purpose exists, under every circumstance of dispute as to those rights: *Ex parte Barlow (k)*.

Brewster, in reply.

CRAVEN, J.

This comes before the Court on appeal from an order of the Court of Exchequer, made upon a new trial motion. The plaintiffs

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| (a) 6 Bro. P. C. 356 (Toml. ed.) | (b) 5 Ir. Eq. Rep. 472. |
| (c) Hayes, 141. | (d) Lyle's App. 70. |
| (e) 1 Jones, 430. | (f) 2 Sch. & Lef. 249. |
| (g) 1 Brod. & Bing. 432. | (h) 1 Huds. & B. 648. |
| (i) 3 Ir. Com. Law Rep. 447. | (k) 2 Ir. Ch. Rep. 272. |

T. T. 1858. brought their ejectment for six acres of the lands of Ballynockane in the county of Tipperary. Separate defences were taken by Rose Tuohey and Margaret Tuohey. Rose Tuohey's defence was for all the premises in the ejectment mentioned, save and except that part thereof comprised in a certain lease bearing date the 4th of November 1769. Margaret Tuohey's defence was for all the premises in the ejectment mentioned, save and except that part thereof comprised in a certain lease bearing date the 5th of November 1772. These ladies' interests were exactly the same, but their defences were not consolidated. A verdict was had for the plaintiffs against Rose Tuohey, with liberty reserved by the learned Judge who tried the cause to have, on the defendant's motion, a verdict entered for her. The other defendant Margaret Tuohey had a verdict for the premises comprised in the lease of 1769. The Court of Exchequer was accordingly moved to have a verdict entered for the defendant Rose Tuohey, and to have the verdict obtained by the defendant Margaret entered in the terms of her defence. The Court of Exchequer, upon this motion, made the order now appealed from, Baron Richards dissenting—an order complying with the terms of the defendant's motion, and entering a verdict for the defendant accordingly.

The question for us is, whether this was a right order? If I have the misfortune in this case to differ with all those of my Brethren who heard the argument, I have the consolation of knowing that my opinion is in conformity with the judgment of the Court of Exchequer, after solemn argument, and also in conformity with the opinion of his Honor the Master of the Rolls.

The facts upon which the questions in this case turn are (I think) these:—In and before the year 1769, one Thomas Johnston was seised in fee of the lands of Ballynockane, including the premises in the ejectment mentioned; and by indenture dated the 4th of November 1769, Thomas Johnston leased to John Hill the mill and mill-house of Ballynockane, containing about 3 acres, at a yearly rent of £4. 11s. This lease was for three lives, with a covenant for perpetual renewal. On the 5th of November 1772, Thomas Johnston made a second lease to the same John Hill. This was

a lease of another portion of Ballynockane, containing 1a. 2r. 28p., and was a lease for two lives, at a rent of £2. 5s. 6d. yearly, and did not contain a covenant for renewal. By lease dated the 25th of March 1788, William Hill, the son and heir of John Hill, the lessee under the leases of 1769 and 1772, being in possession, leased the premises comprised in both leases to Thomas Kent, for three lives, with a covenant for perpetual renewal, at a bulk rent of £22. 15s. yearly. The lives in this lease were different from the lives in the leases of 1769 and 1772. There was in the lease of 1788, besides the covenant for renewal, a covenant for quiet enjoyment during the "term and time aforesaid." By deed of the 5th of December 1793, after reciting the leases of 1769 and 1772, William Hill conveyed all his estate and interest in the lands therein comprised to Thomas Stoney and his heirs. The effect of the deed above stated is this; that in and after the year 1793, Thomas Stoney, as assignee of Hill, was seised of the premises comprised in the two leases of 1769 and 1772, but subject to the lease of 1788, then vested in Thomas Kent, and to the covenants therein contained. Thus we find that, before the year 1802, Johnston was seised of the rent and reversion of and in the two leases of 1769 and 1772, and Thomas Stoney was seised and entitled under those leases, and Thomas Kent was seised and possessed of the premises under the lease of 1788: then in the year 1802, Thomas Stoney became, under the will of Robert Johnston, the son and heir of Thomas Johnston, seised of the fee and inheritance in the lands of Ballynockane, comprising, *inter alia*, the lands comprised in the leases of 1769 and 1772, and therefore also in the lease of 1788. The leases of 1769 and 1772, of which Thomas Stoney was assignee, thus became merged in the fee; and Thomas Stoney, in that year 1802, became seised in fee of the lands comprised in the lease of 1788, and subject to that lease and the covenants running with the lands contained therein, and received the rent thereby reserved to the landlord, as long as he continued so seised.

I shall by-and-bye consider the effect of this transaction. But in the year 1819, a marriage settlement was executed by Thomas Stoney, upon the marriage of his son, the Rev. Ralph Stoney,

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T. T. 1858. whereby the fee and inheritance of Ballynockane, *inter alia*, were conveyed to trustees to the use of the Rev. Ralph Stoney for his life, with remainders over. Under this settlement, Ralph Stoney became tenant for life, with a power of appointment to a son or sons of the marriage. A few other facts should be mentioned, to raise the questions to be decided in this case, viz., the estate of Thomas Kent became vested in Jeremiah Tuohay, the father of the defendants, and in the year 1830 a renewal of the lease of 1788 was executed by the Rev. Ralph Stoney to Jeremiah Tuohay, in pursuance of the covenant contained in that lease. After this, viz., in the year 1855, Jeremiah Tuohay filed a petition in the Court of Chancery against the Rev. Ralph Stoney, praying for a conveyance under the terms of the Renewable Leasehold Conversion Act.* The order sought was resisted by the Rev. Ralph Stoney; and the petition being heard by the Master of the Rolls, his Honor, by his order dated the 11th of December 1855, made an order of reference to a Master; and by subsequent orders of the 29th of February 1856, and the 12th of June 1856, the defendants (who, upon the death of their father, pending the suit, were allowed to continue the proceedings) were finally declared entitled to the benefit of the Renewable Leasehold Conversion Act, with the costs of the suit, and the Rev. Ralph Stoney was ordered to execute the proper fee-farm grant accordingly; and which grant, by deed dated the 10th of May 1856, was accordingly executed by the said Ralph Stoney to the defendants.

Upon these facts two questions arise:—first, independently of any suit in Equity, had the petitioner a right to a fee-farm grant under the Renewable Leasehold Conversion Act? Secondly, was the order of the Master of the Rolls conclusive as to that right? I apprehend that Thomas Stoney, in and before the year 1819, was bound by the covenant for renewal in the lease of 1788. In that year 1819, Thomas Stoney was seised of the reversion in fee, subject to the lease of 1788. As assignee of Hill he was, while in possession, bound by that covenant. The case reported in *Moore*, p. 159, lays down two positions:—first, that a covenant for renewal of a lease is a covenant running with the land. Secondly, that such a covenant binds

* 12 & 13 Vic., c. 105.

the assignee of the reversion in possession ; the language is this :— “Gawdy remembered a case lately adjudged in the Common Pleas, where the lessor for years covenanted in his lease that, at the end of the term, he would make a new lease to the lessee or his assigns, and then granted over his reversion ; at the end of the term, the lessee may bring covenant against the grantee (of the reversion) ; to which all the Justices and Serjeants agreed.” This authority does not stand alone ; it is expressly recognised and applied by the Court in the case of *Bally v. Wells* (*a*), in which latter case the doctrine of covenants is very clearly expounded ; in p. 29, the Court says :—“For a covenant which runs and rests with the land, an action lies for or against the assignee at the Common Law, *quia transit terra cum onere*, although the assignees be not named in the covenant.” In *Roe v. Hayley* (*b*), Lord Ellenborough lays down expressly the same doctrine. This doctrine is admirably expounded by Mr. Smith, in his notes upon *Spencer’s case* (*c*) ; also, in *Spencer v. Boyce* (*d*), a covenant for further assurance is held to bind the lands in the hands of the heir. The general doctrine is well established, that the assignee is bound by all covenants running with the land, but not by collateral covenants. Now, applying this principle to the facts of the case before us, Thomas Stoney, in 1793, as assignee of Hill’s estate, and receiving the rent under Kent’s lease, became bound by the covenant for renewal contained in that lease ; that covenant ran with the land. If then, after 1793, the lives in Kent’s lease had expired, Thomas Stoney being seised of the rent and reversion, the covenant to renew in Kent’s lease would have bound him ; and an action upon the covenant might have been maintained by Kent against Thomas Stoney, upon his refusal to renew. I will not say that a Court of Equity would then have compelled a renewal, because Thomas Stoney had not an estate out of which such a renewal could have been carved ; that point it is unnecessary to discuss. But, in 1802, the fee and inheritance devolved upon Thomas Stoney, and thereby the leases of 1769 and 1772 became

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(*a*) 3 Wils. 25.

(*b*) 12 East, 469.

(*c*) 5 Rep. 15 ; *see* 1 Smith L. Cas. 27.

(*d*) 4 Ves. 370.

T. T. 1858. merged in the fee, and Thomas Stoney became seised of the fee,
Esch. Cham. subject only to the lease of 1788, and the covenants on the land-
lord's part in that lease. Thomas Stoney thus became seised of
BERETON an estate, out of which the covenant for renewal could be abund-
*v.*antly satisfied. He received the rent reserved by the lease of
TUOHEY. 1788, and had the benefit of the tenant's covenants in that lease; and I think he was reciprocally bound by the landlord's covenants for quiet enjoyment and renewal therein contained. His former reversion in the lease of 1788 became merged in the new and larger reversion, and the covenant for renewal, which before bound only the minor reversion, by the merger of that minor reversion, now attached itself upon and bound the reversion in fee. My opinion then upon this part of the case is, that in the year 1819, and before the marriage settlement of that date, the covenant for renewal in the lease of 1788 bound the fee and inheritance in the hands of Thomas Stoney; and it follows that if, in that year, Kent the lessee had filed a bill for renewal against Thomas Stoney, a decree for a renewal would have been obtained: and this, perhaps, is the view of the subject taken by the Master of the Rolls—a Judge not likely to be mistaken upon a question of Common Law, or indeed upon any question. But, secondly, supposing that I am wrong upon the first question, still I am of opinion that the orders of the Master of the Rolls are conclusive upon the question of right. These orders amount to a judgment upon the matter; and the judgment of a Superior Court, so long as it stands in force, *pro veritate accipitur*, and cannot be contradicted: *Co. Litt.*, pp. 167, 168. There may be a writ of error from a Court of Law to a Superior Court—there may be an appeal from the decree or order of a Court of Equity; but, unless in the way of error or appeal, judgments and decrees are not examinable in any Court. There is, however, this exception, if it appear on the face of the judgment or decree that the subject-matter of the judgment was wholly outside the jurisdiction of the Court, was, so to say, *coram non Judice*, then the judgment or decree is a nullity. Thus, if the Court of Chancery should by its decree order a man to be hanged, or if the Queen's Bench

should appoint a receiver over a man's estate, such orders, however formally worded, would be nullities; but where the Court pronouncing the judgment or decree has *general jurisdiction* over the cause, however erroneous that judgment or decree may be, no other Court has a right to touch or gainsay it. The argument in the present case therefore is, that the Master of the Rolls had not jurisdiction to entertain the petition of Jeremiah Tuohey, or to make any order upon it; in other words, that his Honor's jurisdiction is derived from the Leasehold Conversion Act, and that the facts of this case do not come within the provisions of that statute. Now it cannot be denied that, so far as the lands comprised in the lease of 1769, the Master of the Rolls had full jurisdiction, and that, so far, his orders are right. That lease was a lease of lives renewable for ever, and was derived immediately from the fee. His jurisdiction was, no doubt, given by the Leasehold Conversion Act; that Act, however, gave him full jurisdiction over the subject-matter of Tuohey's petition. The other premises, it must be admitted, were comprised in a renewable lease, not immediately derived from the fee, but in a sub-lease, under the leases of 1769 and 1772, viz., the lease of 1788. That was, however, a lease for lives renewable for ever, and, though not originally derived from the fee immediately, it became, by the merger of the leases out of which it was carved, an immediate charge upon the fee and inheritance; it comprised the premises contained in both the leases of 1769 and 1772, at a bulk rent, and under one covenant for renewal. It is admitted that the order was right, as to part of the premises, viz., the premises comprised in the merged lease of 1769. Suppose it went too far in including the premises comprised in the lease of 1772, was not that matter to be corrected rather by appeal than by a judgment of nullity? It was upon the covenant for renewal, contained in the lease of 1788, that the premises leased by the lease of 1769 were entitled to renewal; and were not the other premises, contained in the same deed and within the same covenant, entitled to renewal also? If the covenant was good for one set of premises, why not good for the other also? By the 23rd section of the Leasehold Perpetuity Act (12 & 13 Vic.,

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c. 105), it was the right and duty of the Master of the Rolls, when the right to renew claimed by the petitioner was disputed, "to hear the petition, and to determine the right to such renewal," &c.: and shall this Court say that the Master of the Rolls, having heard the petition, and determined the right to the renewal claimed by the petitioner, has determined wrongly on the whole or in part? But it is argued thus:—The lease of 1788, though containing a covenant for perpetual renewal, does not come within the Act, because it is not a lease "derived immediately from the freehold and inheritance," and, taken as a sub-lease, it was not made by a party competent thereto. I own this argument strikes me as being a mere subtlety, and, while adhering to the words of the statute, defeating its spirit and intention. The lease of 1788 was derived from the freehold and inheritance vested in John Hill, who was seised of the freehold, and had an inheritance in the lands demised, in part an inheritance not in fee, but in *quasi* fee, and still an inheritance; and John Hill was a person competent to make a sub-lease to bind that freehold and inheritance. Had the respondent, the Rev. Ralph Stoney, been seised of the fee-simple in the premises, he could not have resisted the right of the petitioner to the fee-farm grant claimed by them. He was but tenant for life under the settlement of 1819; but, by the 35th section of the statute, he was, for the purposes of the Act, to be deemed and taken as owner of the reversion. There was then, in the case before the Master of the Rolls, an owner of a lease in perpetuity applying for a fee-farm grant, and there was an owner of the reversion (represented by the tenant for life) resisting that grant. It cannot be denied that the petitioner had, by his lease of 1788, a lease which was, to all intents and purposes, a lease in perpetuity; and, if contended that it was not in terms a lease in perpetuity under the Act, I reply that it was in my mind clearly within the spirit and purview of the Act. It was also argued that the order of the Master of the Rolls was merely a consent order, and ought not to bind the remainderman. To this I say, first, suppose it was so, it is as much the order of the Court as if it were not so. But it is a mistake to call this a consent order. After a

fruitless resistance, the respondent's Counsel ultimately state the respondent's willingness to execute the required grant; the proper orders and proceedings are made and had, the respondent is condemned in the costs of the suit, and the fee-farm grant is executed.

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My opinion is, upon the whole, that the Court of Exchequer was right *in omnibus*, and that their judgment ought to be affirmed.

LEFROY, C. J.

If, in this case, I could agree with my Brother CRAMPTON in his premises, I would also agree with him in the conclusion he has come to; and perhaps I may say the same for the other Members of the Court, whose opinions I have been authorised to express. My Brother CRAMPTON has, by the clearness of the judgment which he has given, relieved me from any embarrassment in following him. His judgment is founded upon two propositions:—} first, that there was, upon the facts of this case, a fee-simple inheritance, bound by a covenant for perpetual renewal, and that there was consequently a perpetuity lease in existence, the tenant of which was entitled to a fee-farm grant in place of the lease for lives renewable for ever. That proposition rests, as I have said, upon the facts of the case. But secondly, he contends that, although the facts did not furnish that case, the tenant is entitled to contend successfully, that the perpetuity grant, made under the order of his Honor the Master of the Rolls, gives her a valid title, by virtue of the order of the Master of the Rolls.

To proceed then to consider the case in the order in which my Brother CRAMPTON has dealt with it, let us see, first, whether the tenant had before the Court a fee-simple estate bound by a perpetuity lease. This question concerns only so much of the premises as were contained in a certain lease of the 5th day of November 1772, made by Thomas Johnson to John Hill, who was afterwards represented by William Hill. Did this lease of the 5th of November 1772 originally in its nature bind the inheritance by a covenant for perpetual renewal? I need only call attention to the documents set out in the case before me, to show that it was a lease for two lives only, of 1a. 2r. 23p., part of the six acres

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TUOHEY. therefore, the inheritance was not bound by any covenant for perpetual renewal as to that 1a. 2r. 23p., the subject-matter of the present question between the parties. It is said, however, that Ralph Stoney, who has been decreed to execute the fee-farm grant (I assume that he has been so decreed), did, by some intervening act between the granting of this lease and the execution of the fee-farm grant, let in upon the inheritance this small quantity of land as the subject of a perpetuity covenant. Let us look to dates and the documents, to see if this be so.

It was in the year 1793 that William Hill conveyed to Thomas Stoney the two leases that had been made by Thomas Johnson: one in 1769, of 3 acres, and the other in 1772, of 1a. 2r. 23p. The deed by which these leases were assigned to Stoney recited the leases previously as they stood. What then did Stoney take under that assignment? He took all that William Hill took, bound by everything which, while the leases were in the hands of William Hill, would have bound the inheritance. But did he take more? The assignee of a lease is entitled to the benefit of every covenant which the assignor had, which bound the reversion and inheritance; and accordingly, if William Hill had in those two leases a covenant binding the inheritance, Stoney would have had also a covenant binding the inheritance. But was that so? Was the owner of the inheritance, by the lease of 1772, bound to renew to William Hill, on the expiration of the two lives for which that lease was granted? There was not any covenant for renewal of any sort in that lease. These considerations appear to me, with respect to the case cited from *Moore*, and the other case, to get rid of their application to the present; because in those cases there was a covenant by the reversioner to execute a renewal upon the expiration of the first lease; but in the present case I do not find any covenant of renewal binding the inheritance as to the portion of land in question. It is then said that William Hill, before the assignment to Stoney, had made a lease to Kent, with a covenant for perpetual renewal; and, therefore, that his assignee must be bound, as between him and Kent, to renew Kent's lease. If indeed he had himself a

covenant for perpetual renewal, binding the inheritance as to the portion of land in question, he would, as I said before, be bound to renew to Kent, and to Kent's assignee. But does William Hill's covenant for perpetual renewal bind Stoney, beyond the estate assigned to Stoney? A personal covenant does not bind the assignee, but a covenant binding the estate does bind the assignee. Then supposing W. Hill's estate for two lives to be bound by a covenant for perpetual renewal—it was bound during the two lives—but was it bound beyond the two lives? Does a covenant binding the estate, though it runs with the land, go beyond the estate in the land to which it is attached? I take the law upon this subject to be perfectly clear; beyond that, it is a mere personal covenant, and does not bind the assignee. Then as to estoppel: there is no estoppel when an interest passes, and here an interest did pass, for there passed an interest for the two lives; and, therefore, both upon the principle of law, that a covenant running with the land does not outlast the estate to which it is attached, and that there is no estoppel when an interest passes, Stoney would not be bound to execute a renewal, by virtue of his being assignee of the lease for two lives, and he would not have been liable to an action. But it is argued that, subsequently, in the year 1802, Stoney acquired a conveyance of the reversion in fee^o; and I admit that, in like manner as he would have been bound by everything that bound the lease in the hands of the lessee, so he is bound by everything that bound the reversion in the hands of the reversioner; and, therefore, he was bound by the lease of the 9th of November 1769, as a perpetuity lease; but inasmuch as the reversioner was not bound by the lease of 1772 as a perpetuity lease, the assignee, unquestionably, was not bound beyond what the reversioner himself was; and although this lease of 1772 merged in the inheritance, it did not raise up, or attach upon, or introduce into the fee by its merger, a covenant for perpetual renewal as to that portion of the lands which was not subject, in the hands of the reversioner, to a perpetuity grant. It is very true that surrender and merger, and all those operations which merge a lesser estate in a greater, leave subsisting, for the benefit of third persons,

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T. T. 1858. everything attaching upon the estates merged; but they do not raise up, as against the estate in which the merger takes place, a right that never attached to it.

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Taking it then that, in 1802, this was the condition of Stoney, he was subject, as assignee of William Hill, to everything that bound those two leases; he was bound, as to the lease of 1769, by a covenant for perpetual renewal; but as to the others, he was not in a better or worse position than the party whom he represented. He stood exactly in the position of his assignor. He then settles the estate as he held it, and thereby makes himself tenant for life, with a power of appointment amongst his children, with limitations over in default of appointment, in the usual course of family settlements. Did those claiming under the settlement take subject to anything which did not bind the estate in the hands of the settlor; or was there as to this portion of the land anything binding the reversion in fee? Nothing. If that be so, it would not have been competent for the present claimant, before this Act, by filing a bill for a renewal, to have compelled the children of Stoney to execute a renewal of the lease of 1772; and, let me add, that if, independently of this Act, a bill had been filed against Stoney, and he, in the absence of his children, had executed a renewal under a decree of the Court of Chancery, and if, after his death, his children had brought their ejectment, and had been met in a Court of Law by this renewal, executed by Stoney, the tenant for life, under the decree of the Court; if, I say, that decree had been produced in a Court of Law, the children might have scoffed at it. It is perfectly plain, therefore, that although the Court of Chancery was, before this Act, a Court of competent jurisdiction to decide upon a right of renewal, its decision would be of no avail in the case I have put; and yet everything that is or can be ascribed here to the Rolls order would have existed in Chancery under the circumstances I have mentioned.

How far then does the present Act put the fee-farm grant upon a different footing from a renewal under a decree of the Court of Chancery? I admit that there is one effect of this Act, to relieve cases coming within it from a difficulty which would have existed

antedecedently to its passing ; and it is this : whereas if a renewal had been executed in the absence of the children, the decree not only would not bind the right, but could not even be read in evidence against them, they not being parties to the suit. But in cases within this Act, the estate is sufficiently represented by the tenant for life ; and that brings me to consider what is required to bring a case within the Act. The first and last sections are almost all I need advert to.—[His Lordship read the 1st section].—What is the subject-matter of the Act ? The thing over which jurisdiction is given ? Leases for lives, with covenants for perpetual renewal binding the inheritance. To whom is the jurisdiction primarily given ? To the parties, lessor and lessee, and only to the Court to oblige the reluctant party to do what willing parties might do for themselves ; to enable the Court of Chancery, when parties were not willing to do that which they might do voluntarily, to compel them to do it, provided there were before the Court a perpetuity lease and inheritance bound by it. But is it the meaning or the intention of the Act to give to the Court of Chancery a power to alter the relation between landlord and tenant, to the extent now contended for, of giving to a tenant, with a lease for two lives, without any covenant of renewal, or importing to be such, a right to obtain a fee-farm grant ? The statute rests its operation in a Court of Law upon this—if the inheritance be bound by a perpetual covenant, it is bound by the fee-farm grant. Its effect is to be the same as by the 7th section it would have been if done by the parties voluntarily. It is observable, and quite decisive in my opinion, that there is no section in the Act providing for the operation of the fee-farm grant when made under the order of Court ; and, if it is to have any operation, it can be only by the 7th, which is the very section that determines what shall be the effect of a voluntary fee-farm grant. That section is expressed in these words :—
“ And be it enacted that, from and after the execution of such grant “ to the owner of a lease in perpetuity, or to the owner of an under- “ lease in perpetuity, as aforesaid, such grant shall, *where such grant* “ *is made to the owner of a lease in perpetuity*, bind all persons “ interested in the reversion and in such lease, and all persons bound

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T. T. 1858. "by such lease." What is the meaning of the words, "where such grant is made to the owner of a lease in perpetuity?" Is it not a condition upon which depends the operation of the grant? Is it not a limitation of the jurisdiction, confining the effect of a fee-farm grant, when made under the order of the Court, to that which it would have when made by the voluntary act of the parties? As we go through the Act, we find every section referring back to the first, by the use of the word "such;" and when we come to the section which defines who shall be considered as having an estate bound by a lease in perpetuity, we find that the tenant is entitled to a lease in perpetuity, when he has it from a person competent to give an estate in fee-simple: and the reciprocal legislation is this, that where a covenant for perpetual renewal has been given by a person who could have given an estate of inheritance originally, it was considered not an unreasonable thing that the tenant, instead of a tenancy subject to litigation and uncertainty under his covenant, should have a fee-farm grant, doing away with the necessity of any further proceeding between the parties. In the section which contains the interpretation of terms, we find, "The expression 'lease in perpetuity' shall be taken to apply to all cases where any hereditaments have been or shall be, by a lease or contract derived immediately from the freehold and inheritance, demised, leased or granted, or contracted to be demised, leased or granted, for one or more life or lives, with or without a term of years, or for years determinable upon one or more life or lives, or for years absolute, with a covenant or agreement, by a party competent thereto, in any of such cases, whether contained in the instrument by which such lease or contract is made, or in a separate instrument, for the *perpetual renewal of such lease or contract.*" The section then provides for the case of an under-lease in perpetuity; there the words "derived immediately" are dropped; but those words were not inserted except with a view to classification, and therefore no argument of any value can be founded upon them. There are also other sections important to be observed upon. In the 27th section it is provided that the execution by an officer of the Court shall be substituted for the execution of the party bound, when that

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cannot be obtained by reason of his disability or absence, the effect of the execution by the officer is made just the same as the execution by the party himself *under the 7th section*, which in terms only applies to voluntary grants. Indeed when Counsel in this case were asked in the course of the argument, if they could contend that the parties could in this case have voluntarily given a valid fee-farm grant, they declined to argue that proposition. The 34th section is also important.—[His Lordship read the section].—Instead of this Act giving an extraordinary jurisdiction and effect to what is done under a petition, it gives to what is so done only the effect of what would be done by a voluntary fee-farm grant.

I am therefore of opinion that the judgment below should be reversed; and, as that is the opinion of the Court, it is reversed accordingly, with costs.

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May, 27, 28,
 31. .

(*Exchequer*).

A demised lands to his son B, for three lives renewable for ever, in as full, large and ample a manner as B was then in possession thereof, and he covenanted that he would at all times thereafter, during the continuance of the demise, give to B free liberty of ingress, egress and regress to cut and carry away as much turf of and on the bog of M., adjoining the lands, as the said B, his heirs or assigns or his or their undertenants, should have occasion for, to use on the said demised premises during the continuance of the demise, to be cut in such places and in such manner as A, his heirs, &c., should appoint, and not otherwise.
 —*Held*, that a person who subsequently became undertenant, and occupied a newly built house, was entitled to turbary on M.

Hill v. Barry (Hay & Jon. 688) followed.

Upon the marriage of B, the demised lands were conveyed by A and B, as separate granting parties, to re-lessees, to uses. A conveyed the lands "in as large and ample a manner as the same were then in possession of B," together with all "commona, common of pasture and turbary," rights and appurtenances whatsoever to the premises belonging or therewith usually held or enjoyed. The grant by B contained general words equally comprehensive.

Held, that the right of turbary created by B's lease was preserved or newly granted by the settlement, notwithstanding the merger.

settlement were declared to be for Samuel Waller, for life, with remainder to trustees to preserve, during the life of Samuel, with remainder, subject to a jointure for the intended wife, and portions for younger children, to the first and other sons of the marriage, in tail, with an ultimate remainder to the heirs of Samuel Waller. A full statement of the material portions of this settlement will be found in the judgment, *post*, p. 228.

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The case stated that the lands of Portnecask and Dromnedornary and that part of Polloughbane or Shower mentioned in the indentures of the 18th of April 1728 and 3rd of June 1730 were then known as the townland of Newport, and were vested in Sir Edmond Arthur Waller; that the bog of Moanshaloff was then known as Shower, and that all the estate and interest of the said William Waller in the same were then vested in the plaintiff; that there were then eighty-eight dwelling-houses upon the townland of Newport, some of them large houses with shops, and many of them underlet to room-keepers, a portion of the town of Newport in the county of Tipperary being built thereon; that some of the occupiers of those houses had always exercised the right of cutting turf upon the bog for their own consumption; but that the right of cutting turf for all the houses had not been hitherto exercised; that the defendant was tenant to Sir Edmond Arthur Waller, of nine acres of the lands of Newport, upon which nine acres there were old houses standing when the defendant became tenant, but that all these had been thrown down, and a new dwelling-house erected, in the year 1838, not on the site of any ancient house.

D. Lynch and Austin Duggan, for the plaintiff.

J. A. Lawson, W. Darley and A. G. Richey, for the defendant.

For the plaintiff it was argued that the covenant in the lease of 1728 could not be extended further than to give a right of turbary to the undertenants of Samuel Waller, who were such at the date of the demise, and for consumption in houses then existing upon the demised premises. It was given expressly "for the use of the demised premises," of which houses not *in esse* formed

T. T. 1858. no part; and the true measure of the rights of the tenant was the state of things existing at the time of the demise. The nature of the tenure made no difference; for a lessee for lives renewable for ever was liable for waste. The right of turbary did not pass under the granting part of the lease, but under the covenant, if at all; and the consequence of the construction contended for by the defendant would be that the whole bog would be speedily exhausted, which the Court should presume to have been contrary to the intention of the parties. It was argued that the covenant created a right unlimited in extent; but that contention was repugnant to the stipulation that even the manner of exercising it should be controlled by the lessor. *Hill v. Barry* (*a*) was distinguishable, for it was a case of peculiar facts. The Court came to the conclusion that the right passed under the granting part of the lease; and the subsequent covenant would have been senseless, if it did not extend to the right already granted. Again, the lease of 1725 merged in the settlement of 1730; the lesser estate merged in the greater, and all the incidents of that lesser estate, including this right of turbary, were put an end to. It could not pass under the general words in the granting part of the settlement; for if the right existed at all, it was an unusual right, and could not pass under the words "rights usually held and enjoyed."

For the defendant, *Hill v. Barry* was relied on as an express authority upon the construction of the covenant. Even if the lease merged in the settlement of 1730, the right of turbary passed under the general words of that deed. The general words were very large, and seemed, as was said by Lord Ellenborongh, in *Doidge v. Carpenter* (*b*), "as if they were studiously selected, in order to constitute a grant *de novo*, to subsist in enjoyment as before."

The following cases were cited in the course of the argument:—
Luttrell's case (*c*); *Tucker's case* (*d*); *Lord Darcy v. Askwith* (*e*);
Astry v. Ballard (*f*); *Allan v. Gomme* (*g*); *Tyrringham's case* (*h*);

(*a*) *Hayes & Jo.* 688.

(*b*) 6 M. & S. 47.

(*c*) 4 Rep. 84 *b.*

(*d*) 4 Leon. 241.

(*e*) Hob. 234.

(*f*) 2 Lev. 185.

(*g*) 11 Ad. & Ell. 759.

(*h*) 4 Rep. 36 *b.*

Costard and Wingfield's case (a); Purcell v. Nash (b); Coppinger v. Gubbins (c); Hunt v. Browne (d); Abbot of Stratford's case (e); Governors of Harrow School v. Alderton (f); Rhodes v. Bullard (g); Swan v. Colclough (h); Attorney-General v. Gauntlett (i); Bradshaw v. Eyre (k); Saundeyes v. Oliff (l); Grymes v. Peacock (m); Fort v. Ward (n); Plant v. James (o); Philips v. Philips (p); Bale v. Coleman (q); 2 Platt on Leases, p. 401; Shep. Touch., p. 89; Bissett on Estates for Life, pp. 184, 300; Burt. Real Prop., pp. 352, 353; Sug. Ven. & Pur., 13th ed., p. 149; Furlong, pp. 312, 660; 1 Plow., p. 170; Dyer, p. 130 b.

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Cur. ad. vult.

PIGOT, C.B.

Two questions arise for decision in this case; first, whether by the clause of the lease of the 18th of April 1728, which provides a right of turbary for the lessee, that right extends to the taking of the turf for the use of undertenants whose tenancies did not exist when the lease was made, and whose houses neither then existed, nor are built on the site of houses then existing? Secondly, even if the clause had that operation, whether there has not been a merger of the lessee's estate, and a consequent extinction of any right of turbary created by the lease?

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As to the first question, *Hill v. Barry (r)* has been relied on by the defendant as a direct authority. There, there was a demise of lands, "with all and singular the rights, members and appurtenances "thereunto belonging, in as large, ample and beneficial a manner as "the same are now, and for some time past have been, held and "enjoyed by the said John Barry and his undertenants." In a

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| (a) 2 Leon. 44. | (b) 1 Jones, 626. |
| (c) 3 Jon. & L. 411. | (d) Sau. & Sc. 178. |
| (e) Keilw. 38. | (f) 2 Bos. & P. 87. |
| (g) 7 East, 116. | (h) Hayes & Jo. 807. |
| (i) 3 You. & J. 93. | (k) Cro. Eliz. 570. |
| (l) Moor, 467. | (m) 1 Bulst. 17. |
| (n) Moor, 667. | (o) 4 Ad. & Ell. 749. |
| (p) 1 P. Wms. 34. | (q) Ibid, 142. |

(r) Hayes & Jo. 686.

T. T. 1858. subsequent part of the lease there was a clause in these words—
Eschequer. “And it is further agreed upon by and between the said parties:
DUGGAN v. “these presents, that he the said John Barry, his heirs and assigns
CAREY. “shall have liberty, during the continuance of this demise, to cut
“save and carry away, at and from the bog of the lands of Kilcoleman,
“a sufficient quantity of turf, to and for the use of his men
“their undertenants of the said hereby granted and demised land
“and premises, and to be consumed thereon only; as also full
“free liberty of water at the lough of the said lands of Kilcoleman
“for all such cattle as shall depasture on the said hereby granted
“and demised lands and premises.”

By the lease of 18th April 1728, with which we are dealing, William Waller demised to Samuel Waller, for lives renewable for ever, “the town and lands of Portnecask and Dromnedornary, late in the possession of Edward Burke of,” &c., “together with the part of the lands of Shower and Polloughbane, adjoining the said lands of Portnecask and Dromnedornary, in such manner as the same is divided from the remaining part of the said lands of Shower and Polloughbane, now in the possession of the said William Waller, by the brook running from the lands of Barns, by the wood of Polloughbane, and so by the Pigeon-house, and from thence as the brook runs to the main river, and in such manner as the same was lately held and enjoyed by the said Edward Burke,” and surveyed and set out, &c., “and in as full large and ample a manner as the said Samuel Waller is now in possession thereof, and not otherwise.” And in a subsequent part of the lease there is the following clause:—“And the said William Waller, for him, his heirs, executors, administrators and assigns, doth covenant and agree to and with the said Samuel Waller, his heirs or assigns, that he the said William Waller, his heirs, executors, administrators and assigns, shall and will, at all times hereafter, during the continuance of this demise, give the said Samuel Waller, his heirs and assigns, free liberty of ingress and egress and regress to cut, save, clamp and carry away as much turf of and on the bog of Moanshaloff, adjoining the said lands of Shower, as the said Samuel Waller, his heirs or assigns, or his executors, administrators and assigns, shall require.”

"their undertenants, shall have occasion for, to use on the said demised premises during the continuance of this demise, to be cut in such places and in such manner as the said William Waller, his heirs, executors, administrators and assigns shall appoint, and not otherwise."

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In the case of *Hill v. Barry*, it was, in the first place, sought to confine the right conferred by the second clause of the lease, by reference to the granting part of the instrument, and to limit it to the "manner" in which the premises were then described, viz., "as the same are now, and for some time past have been, held and enjoyed by the said John Barry and his undertenants." The special case in *Hill v. Barry* stated that, at the time of the lease there were, on the lands demised, "several houses and cottages which were occupied by undertenants of the said John Barry," who used to take turf from the bog in question, "for their use and consumption in the said houses and cottages," some of which were still subsisting at the time of the action in *Hill v. Barry*, and others of which had been rebuilt; but the house for the use of which the turf, the subject of controversy, had been taken, was built after the execution of the lease, on a site where no house had existed before. Secondly: the plaintiff's Counsel there contended that, upon the legal effect of the clause itself, it ought to be confined to turf to be used for houses subsisting when the lease was made, or others built on the same sites. The Court held, that the terms of the clause expressly providing that the lessee, and his heirs and assigns, should enjoy the right of turbary for his and their undertenants, could not be so controlled, either by the previous part of the deed, or by the construction of the clause itself; and accordingly held, that the right conferred upon the lessee, his heirs and assigns, extended to enable him and them to provide fuel for all those who, during the lease, should be found to answer the description of his and their undertenants of the lands demised.

It is impossible to distinguish the case now before us from that of *Hill v. Barry*. The differences between the clause of the lease there, and the clause of the lease before us, are merely verbal. There, the lessor covenanted that the lessee, his heirs and assigns, should

T. T. 1858. *have liberty, during the continuance of the demise, to cut, &c., from the bog, a sufficient quantity of turf for the use of his and their undertenants of the demised premises, and to be used thereon only.* Here the covenant of the lessor is, "that he" (the lessee), "his heirs, executors, administrators and assigns, shall and will, at all times hereafter during the continuance of this demise, give the said *Samuel Warren, his heirs and assigns, free liberty of ingress, egress and regress to cut,*" &c., "as much turf of and on the bog" in question, "as the said Samuel Warren, his heirs or assigns, or his or their undertenants, shall have occasion for, to use on the said demised premises during the continuance of the demise." There can be no doubt that words which in form would import a covenant will operate as a grant, if such appears from the context to be the intention of the parties: and there is, in effect, no difference between declaring that the lessor shall allow the lessee and his heirs and assigns free liberty to cut turf, during the continuance of the demise, and declaring that the lessee, his heirs and assigns, shall, during the continuance of the demise, have such liberty.

The clause in the case before us goes on to provide (a very reasonable provision), that the lessee and his representatives shall exercise the power of pointing out the places on the bog where, and the manner in which, the turf shall be cut, &c. But this only modifies the manner of enjoying a right of turbary, plainly with a view to save the lessor from the inconvenience of an indiscriminate and wasteful cutting of the bog, and confers no right otherwise to impede or restrict the enjoyment of the use of turbary, than in showing where and how the turf shall be taken. And accordingly (most properly), in the special case before us, which is framed for the determination of the real rights of the parties, no controversy is raised upon this part of the clause. It is competent to the grantor of any incorporeal right, having full dominion over the property, to modify and qualify the grant in any one of infinite varieties of ways in which it may suit their convenience or their fancies (consistently with law) to make it.

The case of *Hill v. Barry* was, I may observe, a stronger decision in favour of the defendant than that which we are called on to make

for the defendant here; because there an existing state of enjoyment of turbary, by existing undertenants, was expressly referred to; and there was therefore a subject-matter to which it was contended that the clause giving the right of turbary might be confined. But in the present case there is no reference in the lease to any existing undertenants. There is no statement in the special case (as there was in *Hill v. Barry*), that any such undertenants existed, or that any houses or cottages for which turbary was, in fact, used, were subsisting at the time when the lease was made. The lease itself describes the premises as formerly in the possession of Edward Burke, or, at the time of the execution of the lease in the possession of Samuel Waller, the lessee; and the inference from that description would naturally be that there was then no undertenant of the lands. In that view the clause must, in order to give it any operation at all as to undertenants, be applied to include undertenants whose tenancies should be afterwards created; and the time at which these tenancies should be created is left indefinite by the clause which expressly provides for the exercise of the rights during "the continuance of this demise," that is, during a term of three lives, renewable for ever. Some criticism was applied to the word "undertenants" of Samuel Waller, his heirs and assigns. To me it is very plain that whoever were *tenants* holding under the lessee were *his undertenants* in reference to the lessor.

It was stated, in the argument before us, that *Hill v. Barry* applied, for the first time, a rule of law respecting a grant of a right of turbary, inconsistent with what had been laid down in the old authorities, by construing the grant as extending to turbary to be used for houses built on new sites after the execution of the lease; and the cases were referred to, cited in 1 *Furl. Land. & Ten.*, pp. 312, 660. None of these authorities conflict with the proposition, that there may be, by grant, annexed to an estate in land, a right of turbary for the use as well of houses to be afterwards built upon the lands, as of houses existing upon them at the time of the grant: I shall here refer shortly to them. In *Costard v. Wingfield* (a), reported under that name, and that of *Wakefield's*

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T. T. 1858. *case*, in several books which I shall mention), it was determined
Exchequer. that, upon an alleged prescription, that all the inhabitants of a
 DUGGAN town should have common of pasture, on certain lands, for their
 v. cattle, lenant and couchant within the town ; an inhabitant of a
 CAREY. modern house, built within thirty years, could not maintain such
 a right. The Court said that if he could—"then a prescription
 might begin at this day, which cannot be." The Court also
 appeared to consider the prescription unreasonable, as tending
 to destroy the lord's (statute) right of approvement, and as injurious
 to the ancient tenants of the lord ; and they appeared to
 consider the right to such a common, as well as to estovers, must
 be confined to ancient houses. *Lord Darcy v. Ashworth* (a)
 only decided that in a lease for years of a manor, expressly de-
 mising mines, there was not included, though necessary for the
 working of the mines, as an incident to the lease, the power of
 felling timber on the lands, for the purpose of providing matters
 necessary for the mines. Though, under the lease, the lessee
 was allowed to open the mines, it was held that he must do so
 at his own expense ; as, if he built a new house, it must be
 at his own charge, and not by means of estovers at the expense
 of the inheritance. In *Luttrell's case* (b), it is laid down that
 "If a man has estovers, either by grant or prescription, to his
 house," he may alter the rooms or chambers, changing a hall
 into a parlour, or a parlour into a hall; but if he builds new
 chimneys, or makes new additions to his house, he cannot spend
 any of the estovers in the new chambers, or in the part newly
 added. *Valentine v. Penny* (c) decided that a plea of pre-
 scription of common of turbary alleged to be annexed to a cottage,
 for the owner to dig and sell *ad libitum*, was bad ; "for such
 a common was an interest and a frank-tenement ; and further,
 "it is repugnant in itself; for a common appertaining to a house
 "ought to be spent in the house, and not sold abroad."

In *Tyrringham's case* (d), and nearly the same will be found
 in *Co. Lit.*, pp. 121-6, it is said :— "But everything incorporate

(a) Hob. 234 ; S. C., H ut. 19.

(b) 4 Rep. 86 a.

(c) Noy. 145.

(d) 4 Rep. 37 a.

"cannot be appended to a thing corporate; as common of turbary T. T. 1858.
 "cannot be appended to land, but to an house, as it is held,
 "5 Ass., 9; for the thing which is appendant ought to agree
 "with the nature and quality of the thing to which it is ap-
 "pendant; and turfs are to be spent in a house." These are
 the old authorities cited by Mr. *Furlong*; and with the accuracy
 which, I believe, generally characterises his able work, he limits
 the proposition which he extracts from those authorities to what
 might be fairly deduced from them, and says (p. 660):—"If such
 "lessee," that is, a lessee who has a right of turbary appurtenant
 to a house situate on a farm, "divide his holding among under-
 "tenants, and build new houses on the premises for their use,
 "he cannot extend any privilege of turbary to such new houses,
 "unless authorised to do so by the terms of the original lease;"
 and for that proposition he cites *Hill v. Barry*. That the pro-
 position must be so qualified was, in effect, determined at a very
 early period. In a case which was not cited in *Hill v. Barry*
 (though the principle of it was precisely what the Court there
 applied), viz., *The Countess of Arundel v. Steere* (a), a defendant,
 in trespass, justified the cutting of trees, by alleging "that he was
 "seised of a house and land, and prescribed to have *estovers* for
 "the repairing of the said houses, or for the *building of new upon*
 "said land;" and justified for making reparations of a bake-
 house, &c. On demurrer to the plea, it was argued that the custom
 was unreasonable to take estovers for new houses. One of the
 Judges was of that opinion, holding "that the prescription was
 "not good, for it ought to be reasonable and usual, which is
 "to repair ancient houses, and not to build new, for then he
 "might cut down all the wood and destroy it." But all the rest
 of the Court "held that it was a good prescription; for one may
 "grant such estovers at this day; and by the same reason there
 "may be a prescription for them." And in *White v. Coleman* (b),
 the plaintiff, in trespass, in answer to a plea, justifying the taking
 of the plaintiff's cattle, damage feasant, answered by a replication,
 asserting a right to go on the premises, by stating "that the

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(a) Cro. Jac. 25.

(b) Freem. 134; S. C., 3 Keb. 247.

- T. T. 1858. "plaintiff was an inhabitant in Camilton; and that the mayor
Eschequer. "and burgesses of Camilton had common of estovers of turves for
DUGGAN "turves for them, and for every inhabitant, to burn in *quibuslibet*
v. CAREY. "messuagis suis."

There was a demurrer to the replication, and several objections were made; among them, it was argued for the defendant that the prescription was not for estovers to ancient messuages; and, if this prescription were good, every inhabitant that builds a new messue shall have estovers belonging to it. Two of the Judges (Vaughn and Atkins) were of opinion "that the new houses shall have estovers, and the new inhabitants also, as well as the old, by virtue of this prescription; for they said, if a man grant common to the mayor and burgesses of such a place, and there are but ten burgesses at the time of the grant, and afterwards there are twenty, they shall have common; and so it is, in case of inhabitants, if they increase, the common shall increase; *sed Windham, J., debat*, because he said it shall only be to those that were capable at the time of the grant." Another objection was made, which showed the distinction between this case and that of *Costard v. Wingfield*, before referred to, viz., that the inhabitants, as such, could not prescribe. But to this the Court answered that, though that was so, the mayor and burgesses might prescribe for them and the inhabitants; and referred to the direction of one of the Judges (Littleton) in the *Year Book*, 15 Edw. 4, p. 29. The case was ultimately decided upon a point of pleading, the Court holding that there was a departure. But both the reports show that the substantial questions were deliberately considered by the Judges. If the two members of the Court who held in favour of the prescription, against the doubts of the third, were right, it was a strong confirmation of the principle of the judgment in *The Countess of Arundel v. Steere* (a), and of that of the decision of this Court in *Hill v. Barry*. I should not have said so much on the subject of that decision (by which of course we are here bound), but that I think it of great importance to prevent, as far as Judges can, the attaching of doubts to a rule, whether of law or of construction, which, for any

(a) Cro. Jac. 25.

considerable time, has governed the dealings of men and the opinions of their advisers. The decision in *Hill v. Barry* is now nearly a quarter of a century before the Profession and the public; it has never (that I am aware of) been questioned until now. It relates to a class of clauses, varying in phraseology, but substantially alike, which, in the experience of every lawyer, are known to be very usual, and to affect extensive holdings and valuable interests in this country. The lease now before us shows that such a clause was in use 130 years ago; during that long lapse of time it has been acted on. The case of *Hill v. Barry* was about sixty years later. I am not sorry that I am for myself able to say that, having looked into the authorities, I not only defer to that case as a decision, but I do not entertain the least doubt that it was right. The reasons given by the Court for the construction of the instrument then before it appear to me consistent not only with the ordinary rules applied to the construction of deeds, but to the plainest dictates of common sense and justice. The Court simply gave legal effect to the plainly expressed intention of the parties, and held that, by that plainly expressed intention, it was competent to the owner of land to bind it.

In the case before us, as in that of *Hill v. Barry*, the topic was urged that, by allowing the right of turbary to extend to new houses, the whole bog may be exhausted. If words are doubtful, and if one interpretation be reasonable, and the other the reverse, the Court may adopt the former, and reject the latter construction; but where the words are clear, it is not competent for a Court which has to expound the contract of the parties, and not to make one for them, to relieve either from the consequences of an improvident bargain, or of unforeseen events, which may alter the value or the circumstances of the property with which the contract deals. On the contrary, the rule will apply, that the words must be construed most strongly against the grantor, and most beneficially for the grantee. Extreme cases have been put, of the great multiplication of houses on those lands, the consequent exhaustion of the bog, and of this not having been in contemplation of the parties. But no line can be drawn indicated by the contract; and we are not at liberty to draw any which the contract does not supply—no line

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T. T. 1858. at all in truth could be drawn, but that with which the terms of
Eschequer. the contract itself are plainly inconsistent, namely, that turbary
DUGGAN should not be enjoyed for houses built after the execution of the
v. CAREY. lease. But against this, the argument of unreasonableness recoils
with a force which cannot be resisted; for on that construction
under this lease, made by a father to his son, for lives renewable
for ever, if the lessee, intending to reside on the premises, and to
turn the land into an improved demesne, should build a mansion-
house upon a site on which no house existed before, he would be
left destitute of fuel for his own dwelling; while, for the use of
a labourer in a cottage previously existing, or for use in an out-
house on that site of such a cottage, provided with a boiler for
preparing food for the lessee's cattle, the right of turbary could be
applied. It is far more reasonable to hold that, in those early times,
the parties, with abundance of bog in the country, and looking to
the future improvement of the land demised, contemplated that
improvement by means of sub-tenants, whose very existence, to
some extent, must depend upon fuel, and were content voluntarily
to incur the risk of a contingency so remote as that of the bog
becoming exhausted in one or two centuries after the granting of
the lease. Possibly the cutting out of the bog, and the reclaiming
of the site of it for the benefit of the landlord, may have been
one of the objects contemplated by the lessor. These are conjectures
on which, for either party, we cannot found construction; we
can only deal with their words. The lessee was a purchaser for
value; and he is not the less entitled to the full benefit of the
improvement in the value of the land, which the right of turbary
imparts, because, at the end of more than a century, the turbary
also has acquired a value far greater than it possessed when the
lease was made. In every grant of a right of turbary in perpetuity,
the parties must be considered as contemplating the inevitable
necessity, however remote the event, of the exhaustion of the bog;
but their so contemplating or not cannot determine the meaning of
their contract. It is probable that in very few leases for perpetual
interests, granted above a century ago, did the parties contemplate
the change which the progress of time and the improvement of lands

have since made in the relative values of leaseholds and reversions.

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The defendant further contends that, by the settlement of the 3rd of June 1730, there was a merger of the lessee's estate and interest under the lease of 1728 in the fee, both having been conveyed by that settlement to re-lessees, to the uses of the settlement. The settlement was executed upon the marriage of Samuel Waller, the lessee of the lease of 1728; his father William, the lessor in that lease, and Samuel, were granting parties in two distinct and separate granting parts of the settlement. William first conveys in fee several denominations of land, including the premises comprised in the lease of 1728, to re-lessees, to uses. The uses are then declared in the usual way, the lands being limited to the use of Samuel, for life, with remainder to trustees, to preserve, for the life of Samuel, with remainder (subject to a jointure for the intended wife) to trustees of a term, to secure the jointure and portions for younger children, with remainder to the first and other sons successively, in tail, and an ultimate remainder to the heirs of Samuel, to whom a power is given to charge a sum of £500 upon the lands. At the end of the deed, in the other witnessing part, Samuel conveys the lands, which had been demised by the lease of 1728 to the re-lessees, to the uses previously declared, but without reciting or referring to the lease. No doubt can of course exist that the effect of this settlement was to merge the estate granted by the lease in the inheritance; but in the granting part, in which William the lessor conveys, after the other lands conveyed are named, the description of the parcels proceeds to designate the lands comprised in the lease, in the following terms:—

“All that and those the town and lands of Portnecask and
“Dromnedornary, together with that part of the lands of Shower
“and Polloughbane, adjoining the said lands of Portnecask and
“Drumnedornary, together with the mill thereunto belonging, con-
“taining in the whole 180 acres of profitable lands, plantation
“measure, be the same more or less [in as large and ample a manner
“as the same are now in possession of the said Samuel Waller*],

* The parts printed between brackets are those which are not contained in the description of the parcels in the second witnessing part—see next page.

T. T. 1858. "situate, lying and being in the barony of Owney and Arra, and
Exchequer. "county of Tipperary;" and then follow these words (which must,
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"together with all and singular the castles, houses, meausages,
"tenements, buildings, meadows, seedings, pastures, arable lands
"[*commons, common of pasture and turbary*], woods, underwoods,
"waters and water-courses, fishings, fishing-weirs, bogs, loughs,
"heaths, mountains, furze, quarries, mines, minerals, royalties,
"liberties, privileges, emoluments, *rights, members, advantage,*
"*appendances and appurtenances* whatsoever, to the said hereby
"granted and released towns, lands, tenements, hereditaments, pre-
"mises, or any of them, or any part thereof, *belonging or in*
"*anywise appertaining [or to or with the same or any part thereof]*
"*usually held or occupied or enjoyed*, or accepted or reputed,
"deemed, taken or known to be part, parcel or member thereof,
"or of any part thereof."]—In the granting part, in which Samuel
conveys, they are conveyed as "All that and those the said town
"and lands of Portnecask and Dromnedornary, together with that
"part of the lands of Shower and Polloughbane adjoining the
"said town and lands of Portnecask and Dromnedornary, together
"with the mill thereunto belonging, containing in the whole one
"hundred and eighty plantation acres of profitable lands, plantation
"measure, be the same more or less, situate, lying and being in the
"barony of Owney and Arra, in the county of Tipperary; together
"with all and singular the castles, houses, buildings, orchards,
"gardens, meadows, pastures, ways, wastes, waters, water-courses,
"fishings, fishing-weirs, bogs, loughs, moors, marshes, heaths, furze,
"woods, underwoods, easements, commodities, advantages, emolu-
"ments, appendances and *appurtenances* whatsoever, to the last
"mentioned towns, lands and premises, and every or any part and
"parcel, belonging or in anywise appertaining." The only difference
between the description of the parcels in the two granting parts
(besides a slight variation in the collocation of some of the sweeping
words) consists of the omission, in the second, of the reference to
the possession of Samuel Waller, and the omission of the mention

of common or of turbary, and of any reference to rights, advantages, appurtenances, &c., usually enjoyed with the premises.*

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Now, in reference to the conveyance of incorporeal rights annexed to land, these propositions are well established; first, a right such as this (of turbary) will pass under the terms "with the appurtenances," in a conveyance of the tenement to which it appertains, if actually appertaining to it, by law, at the time of the conveyance: *Solme v. Bullock* (*a*). Secondly, if the right be not, by law, one actually appertaining at the time of the conveyance to the tenement granted, it will not pass by these words, although actually enjoyed with it at the time. *Grymes v. Peacock* (*b*), *Barlow v. Rhodes* (*c*), are among the ancient and modern authorities for this proposition. But, thirdly, if words are used which express the intention that the right shall pass, as words referring to the existing enjoyment, in a conveyance of premises with "all ways therewith, or with any part thereof used and enjoyed," the incorporeal right will be granted, and will be treated as created and annexed by the terms of the instrument: *Kooystra v. Lucas* (*d*); *Hinchcliffe v. Earl of Kinnoul* (*e*); *Bradshaw v. Eyre* (*f*). When the settlement of 1730 was executed, there was, according to our view of the case, a right of turbary annexed to the estate which Samuel Waller had under the lease of 1728. He was in the actual possession of the lands, for he is so stated to be in the settlement, and therefore must be taken to be then in enjoyment of the right of turbary which was annexed to his estate two years before. He grants the lands, with all their appurtenances. According to the authorities, if his brother William had not granted the reversion to the same re-lessees, the right of turbary would have clearly passed by the conveyance of Samuel: but in the father's grant, the lands are conveyed expressly, "with the common of pasture and turbary," and all other rights and appurtenances to the premises granted, or any part thereof, belonging, "or to or with the same, or any part thereof, usually held or occupied or enjoyed, or

(*a*) 3 Lev. 165.

(*b*) 1 Bulstr. 17.

(*c*) 1 Cr. & M. 439.

(*d*) 5 B. & Ald. 830.

(*e*) 5 Bing. N. C. 1; S. C., 6 Scott, 650. (*f*) Cro. Eliz. 570.

* See ante (*) note.

T. T. 1858. "accepted or reputed, deemed, taken or known to be part, parcel
Exchequer. "or member thereof, or of any part thereof." Whether we take
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CAREY. the two granting parts as two successive conveyances, or as one
conveyance, executed *uno fato*, by the two parties at the same
time, though by different parts of the same deed—see *Doe v. Big-
lam* (a)—it is plain, from the words employed, that they intended
the fee and the leasehold to be settled, with the same incorporeal
advantages annexed to them, as were either existing in title or
existing in enjoyment, at the moment when the parties were about
to set their hands and seals to the deed. To hold otherwise, not
only would be to deny to the words used the force which the
decided cases establish as their legitimate legal import, but would be
to frustrate the manifest plan and purpose of the settlement. The
son had vested in him the leasehold, with the right of turbary
attached, to be exercised on bog on other lands. The father had
the reversion, and he had the bog on which the right of turbary
was to be exercised. What was plainly intended by father and son
was, to settle the fee of that property, which belonged both to the
landlord and the tenant of the lease of 1728. But a valuable part
of the property was the right of turbary attached to the premises. If
the lease had not been granted, the father would have had the power,
as owner, of taking turbary on his own bog. Under the lease, the
son had the same right of turbary on the same bog. And unless
we hold that the right of turbary was preserved, or newly granted
by the settlement, we must hold that each of the parties, the
father and the son, intended that the lands should be settled
abridged of a most important right, which, whether they were
held in fee-simple in possession, or as a leasehold in possession,
had been enjoyed with them before. It would be inconsistent
with reason and common sense, that when father and son were
settling the fee for the perpetual enjoyment of the family, they
should have concurred in depriving the land of an incident
which they had both, two years before, deemed essential for the
perpetual enjoyment of a lessee. We could not give such a con-
struction to the settlement, if we found words in it which would

enable us to avoid it; and we do find words, as I have stated, which clearly indicate the opposite construction. If an authority were wanted to sanction this construction, it is furnished by the case of *Doidge v. Carpenter* (*a*), cited in his argument by Mr. *Lawson*. There, a lessee held a farm under a demise for a term of years, with a common of pasture; he obtained a conveyance of the fee of the lands, "with the common and commons of pasture thereunto belonging or in anywise appertaining." The estate for the term of course merged in the fee; but the Court held that the words used operated as a new grant of the common. "Thereunto belonging or in anywise appertaining," said Lord Ellenborough, "which are the words of the conveyance in fee, seem as if they were studiously selected in order to constitute a grant *de novo*, to subsist in enjoyment as before." I may add that it does not appear from the deeds that any right of turbary was attached to any other premises put in settlement by the deed of 1730, and none such appears in the case. There would, therefore, seem to be nothing but the right in question, on which the words "common of turbary" in the settlement could operate.

On the whole, we are of opinion that this right of turbary exists, as enjoyed by the defendant in the act complained of; and, consequently there must be judgment for the defendant.

PENNEFATHER, B.

It is almost unnecessary to say that we all concur in the judgment which has been so ably delivered by my LORD CHIEF BARON.

RICHARDS and GREENE, BB, concurred.

(*a*) 6 M. & S. 47.

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FARMER v. FOTRELL.

Nov. 2.

Where a defendant pays money into Court in discharge of the action, and the plaintiff declines to accept the sum lodged, but fails upon an issue raised as to the sufficiency of the payment, the defendant is entitled to his full costs of suit, without any deduction by the plaintiff in respect of his costs up to the lodgment.

In this case, which was an action for waste and breach of covenant, the defendant, in pursuance of the provisions of the 75th section of the Common Law Procedure Act, 1853, lodged a sum of £7 in Court, in discharge of the plaintiff's demand. The plaintiff declined to accept this sum, and went on to trial upon an issue raised as to the sufficiency of the payment. The case was tried before Lefroy, C. J., and a special jury, at the Summer Assizes of 1858, for the county of Kildare, when the jury found that the sum lodged in Court was sufficient to satisfy the plaintiff's claim. The defendant, having thus obtained a verdict, proceeded to tax his costs; and upon the taxation, the plaintiff insisted that he was entitled to credit, as against the defendant's costs of the action, for all costs incurred by him up to the lodgment of the £7 in Court. These costs were taxed and certified to the sum of £5. 9s. 1d. The defendant having refused to allow any deduction—

T. A. Purcell now moved, on the part of the plaintiff, for an order, that the defendant should pay to the plaintiff the sum of £5. 9s. 1d., being the amount of taxed and certified costs incurred by the plaintiff in this action up to the lodgment of the £7 by the defendant. But for the 78th section of the Common Law Procedure Act, 1853, it is admitted that the plaintiff is entitled to these costs, and that section made no alteration in the previous practice. The Act does not deal with the right of the parties to costs, but with the mode of recovering them. It lies on the defendant to show some express legislation disentitling him to the costs; for it has been always held that a lodgment in Court by the defendant was an admission that the plaintiff was right so far, and therefore entitled to costs. Since the passing of this

Act, it has been held that money paid into Court is money recovered by the action: *Hughes v. Guinness* (*a*); and if the plaintiff declines to accept the sum lodged, the action proceeds as if it were a new action, for the balance. If the defendant then succeeds, he is entitled to "his costs of suit" in respect of that balance claimed; and this construction satisfies the 78th section.

M. T. 1858.
Erskine
v.
Tanner
v.
Fotterall.

W. Duggan, contra.

The plaintiff is not entitled to any costs in respect of this lodgment. Before the passing of the Common Law Procedure Act, 1853, he would have been entitled to costs in such a case as the present, under the express words of the 74th General Order, 1850; but that Order, and the Process and Practice Act upon which it was founded, have been repealed; and the present Act and Rules contain no enactment giving to the plaintiff the costs here sought, which, it must be inferred, it was intended he should not get, as the right to costs is founded on statute, and the statute and Order giving them have been expressly repealed. The 78th section of the Common Law Procedure Act expressly enacts that, in a case like the present, the defendant shall be entitled to his "costs of suit;" and can it be said he gets his costs of suit, if he is obliged to pay a portion of his adversary's costs incurred in the same action? In *Rumbelow v. Whalley* (*b*), Patteson, J., expressly says, that if the facts there had been what they here are, the defendant would have been entitled to his full costs of suit without deduction. *Handcock v. Foulkes* (*c*) is an authority to the same effect. The object of the 78th section was to impose upon a plaintiff, persisting in litigation, the risk of forfeiting, in case of failure, the right to costs conferred by the preceding sections.

T. A. Purcell replied.

Picot, C. B.

In this action, on contract, the defendant paid money into Court,

(*a*) 7 Ir. Jur. 298.

(*b*) 16 Q. B. 399.

(*c*) 9 M. & W. 431.

M. T. 1858. with the usual plea, stating such payment. The plaintiff, instead of accepting the money so paid in satisfaction of his demand, proceeded to try the sufficiency of the payment, upon an issue raised for that purpose, according to the 78th section of the Common Law Procedure Act (1853). Upon that issue the defendant obtained a verdict, and his costs of suit have been taxed; and the object of the present motion, made on the part of the plaintiff, was, to obtain an order, directing that the plaintiff's costs, up to the time of the payment of the money into Court, should be deducted from the amount of the defendant's taxed costs of the action. We disposed, during the argument, of an objection made to the form in which this matter has been brought before us; and we now proceed to dispose of the substantial question as to the plaintiff's right to those costs. That question is, whether the plaintiff is at all entitled to them? Such right, if it exists, must be the creature of statute, and it must be determined by the 77th and 78th sections of the Common Law Procedure Act (1853), 16 & 17 Vict., c. 113.—[His Lordship read those sections].

The 74th and 75th sections regulate the payment of the money into Court, and the pleading of such payment. The 76th section authorises the plaintiff (at any time before verdict or judgment for the defendant, or peremptory order for not proceeding to trial) to draw the money lodged. After such verdict, judgment or order, the money must remain to answer the defendant's costs. The 77th and 78th sections then provide expressly for the two several and distinct cases—first, of the plaintiff's accepting the sum so drawn, in satisfaction of his demand; and secondly, of his declining so to accept it. Whether he accept it or not, he is entitled to draw it, under the 76th section. If he do accept it in satisfaction of his demand, the receipt which the plaintiff gives to the Master of the Court for the money shall so specify. The plaintiff's costs shall be taxed, and the 77th section provides for their recovery a specific remedy. If he decline to accept the money in satisfaction of his claim, the 78th section directs that the sufficiency of the payment shall be tried upon an issue raised for that purpose; and

if such issue be found for the defendant, the section enacts, M. T. 1858.
 "That the defendant shall be entitled to judgment, and his costs
 of suit." Thus then the 77th section, providing for one event (viz.,
 acceptance of the money in satisfaction), gives the plaintiff costs,
 and prescribes a remedy. The 78th section, providing for the
 opposite case (viz., non-acceptance of the money in satisfaction),
 gives the plaintiff no costs, but expressly gives "his costs of suit"
 to the defendant; and the effect of the two sections plainly is,
 to give to the plaintiff the option of accepting the money paid
 in satisfaction of his demand, or of proceeding (which I apprehend
 he may also do, whether he accepts it or not) for the recovery
 of a greater sum, at the risk of becoming liable to the defendant's
 costs of the action. The Legislature making express provision
 for the costs in the two opposite cases, neither party can obtain
 more than what the Legislature so provides. And if we should
 hold otherwise, we must read in the 78th section the words
 "The defendant shall be entitled to judgment and his costs of
 suit" as if they were "shall be entitled to costs, *less than* the
 "amount of his costs of suit, by the amount of plaintiff's costs up
 "to the lodgment of the money;" or "shall be entitled to his costs
 "of suit *after deducting the plaintiff's costs up to the lodgment*
 "of the money." We cannot so deal with the plain words of the
 statute.

If the view we have taken needed confirmation, we should find it
 in the judgment of the Court of Queen's Bench in England, dealing
 with a Rule of Court framed in terms substantially similar to those
 of the 78th section of the Common Law Procedure Act. The Rule
 of Trinity Term 1 Vic. (*Eng.*), provided that the plaintiff, after a
 plea of payment of money into Court, should be at liberty to reply,
 by accepting the sum so paid in full satisfaction and discharge of
 the cause of action in respect of which it was paid; and a provision
 was made for taxing and recovering his costs, analogous to the 77th
 section of the Irish Common Law Procedure Act. The Rule then
 proceeds:—"Or, the plaintiff may reply that he has sustained
 "damage (or that the defendant is indebted to him, as the case may
 "be), to a greater amount than the said sum; and, in the event of

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M. T. 1858. "an issue thereon being found for the defendant, the defendant shall
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 POTTERELL. be entitled to judgment and his costs of suit." In *Rumbelow v. Whalley* (a), a defendant had pleaded, as to a part of plaintiff's demand, payment into Court, and that, as to that part, he was not further indebted; as to another part, payment before action brought, and, as to the residue, that he was not indebted. The plaintiff replied, denying the sufficiency of the payment into Court; and as to that, the defendant had a verdict. The plaintiff also took issue on the plea of payment, and on the denial of liability to the residue of the demand; and, as to these, the verdict was for the plaintiff. The Court held that this was a case in which the defendant was not within the latter part of the Rule; and they held that the plaintiff, having accepted the payment of the money in discharge of the demand in respect of which it was paid, was within the earlier part of the Rule, and was entitled to his costs, in reference to the part of the demand for which the money was paid into Court, incurred up to the time of payment. But Mr. Justice Patterson distinguished that case from such a case as the one now before us. He says:—"It comes to this, therefore, that whenever the only question intended to be raised by the pleadings is the amount of the original debt, the defendant can put the plaintiff to the alternative of accepting, in discharge of his whole demand, whatever sum the defendant chooses to pay into Court, or proceeding for more at the risk of the costs of the suit; but where the original debt is larger than the sum which the defendant chooses to pay into Court as a balance, and thus he is obliged to plead an affirmative plea or pleas to reduce the original sum to such balance, he necessarily insulates the sum so paid in from the rest of the declaration, and so entitles the plaintiff to accept it in discharge of the causes of action in respect of which it is paid into Court, and to receive all costs of suit thereon."

The view which we take of the 77th and 78th sections of the Common Law Procedure Act is fortified by a consideration of the 74th General Rule (1850), regulating the practice of all the Courts of Law in Ireland, when the Common Law Procedure Act was

passed. By that Rule, if the plaintiff at the trial should not establish a demand greater than the amount paid into Court by the defendant, the defendant was entitled to a verdict; but the Rule provided that, "the plaintiff shall, notwithstanding such verdict, be entitled to the costs of the action up to the time of such lodgment, to be taxed by the proper officer." The Legislature may fairly be presumed to have known and considered the existing practice, which it was its purpose, in the Common Law Procedure Act, to alter; and where it provides for the plaintiff's costs, in the case in which he accepts the money lodged, and omits that provision in providing for the case in which he declines such acceptance, while it does provide, in the latter case, for the costs of the defendant, the fair inference is, that the Legislature did not expressly give any costs to the plaintiff, because it did not intend that he should get them, and that the provision of the General Rule, which gave him the costs up to the lodgment of the money, although he should be defeated on the trial, should no longer form part of our practice.

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PENNEFATHER, B., concurred.

GREENE, B.*

The rule in England, with respect to which the Court of Queen's Bench, in *Rumbelow v. Whalley*, made the decision they did, was, in the following year, embodied in the Act 15 & 16 Vic., c. 76. The 73rd section of that Act is identical with the 78th section of our Common Law Procedure Act; and we have, therefore, a judicial construction put upon that Act in England, by which, in my opinion, we are bound.

Motion refused, with costs.

* RICHARDS, B., *absente*.

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WINTON v. MOORE.

Note 3.

In an action In this action, the plaintiff Rose Winton sought to recover damages for wrongful dismissal, the second count of the summons and plaint charged that, by agreement between the plaintiff and the defendant, the plaintiff entered into the service of the defendant, &c., such service to continue until one calendar month's notice to determine same should be given on either side. The defence pleaded was a traverse in terms of the whole of that allegation.—
Held, per Piggott, C. B., and Richards, B., that this was a good plea;—*per Greene, B.* Such a plea is bad, as putting in issue both the agreement and entry into the service.

for breach of an alleged agreement, under which she had been retained as governess in the defendant's family. The summons and plaint contained two counts, and the second count was as follows:—

“ And also for that, by agreement between the plaintiff and defendant, “ the plaintiff entered into the service of the defendant in the capacity “ of governess and instructor of children, at a salary of £20 sterling “ per annum, payable quarterly, such service to continue until one “ calendar month's notice to determine same should be given on “ either side; and although the plaintiff has always been ready and “ willing to continue in such service on the terms aforesaid, yet the “ defendant, without giving plaintiff one calendar month's notice “ as aforesaid, refused to allow the plaintiff to continue in his said “ service, and hath wrongfully discharged her from same, without “ any reasonable cause, to plaintiff's damage,” &c.

Plea to the second count—“ That the plaintiff did not, by agreement between the plaintiff and defendant, enter into the service of the defendant in the capacity of governess and instructor of children, at a salary of £20 sterling per annum, payable quarterly, such service to continue until one calendar month's notice to determine same should be given on either side.”

The present application was to set aside this defence as double, and amounting to a traverse of two distinct matters, and that the plaintiff might be at liberty to mark judgment.

C. Coates, in support of the application.

The plea traverses both the entry into the service and the agreement. The plaintiff is bound under this plea to prove both; for either allegation in the defence, if proved, affords a complete answer to the

action. *Germaine v. The Athenæum Life Assurance Company* (*a*) M. T. 1858. is precisely in point, that when any plea contains several matters, any one of which would be an answer to the action, leave of the Court must be obtained.

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v.
MOORE.

J. A. Byrne, contra.

The ambiguity complained of is in the summons and plaint, and not in the defence. The plaintiff avers that, by agreement between the plaintiff and the defendant, the plaintiff entered into the service of the defendant. This is a material issuable allegation, which the defendant is entitled to traverse as laid; and the fact that the plaintiff may have stated his complaint with more particularity than is necessary does not alter the rule: 1 *Chitty on Pleading*, 5th ed., p. 644. The usual traverse of a count for work and labour done by the plaintiff for the defendant, at his request, or for money paid for the use of the defendant, at his request, is in the very words of the count; and yet there the plaintiff must prove that the work was done or the money paid, and also the request, express or implied. In *Darcey v. Cahill* (*a*), to an action for maliciously and falsely, and without reasonable or probable cause, filing an affidavit of debt, &c., a defence, traversing in terms the allegations in the plaint, was held good. *Cantwell v. Cannock* (*b*) is to the same effect. An issue can be easily framed in the terms of the plea.

PIGOT, C. B.

This is really a question turning upon the construction of the pleading—a matter which will sometimes strike different minds in different ways. The declaration appears to me to contain a cumulative averment of a single qualified fact; namely, an entry of the plaintiff into the service of the defendant, under an agreement. It resembles the allegation in a count for use and occupation, that “the defendant is indebted to the plaintiff for the use, by the plaintiff’s permission, of messuages and lands of the plaintiff.” That averment may be considered as involving these several matters; first,

- (*a*) 5 Ir. Com. Law Rep. 205. (*b*) 6 Ir. Com. Law Rep. 121.
(*c*) 6 Ir. Jur. 151.

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that there were lands held by the defendant; secondly, that they were the lands of the plaintiff; and thirdly, that they were held by his permission: yet it was never held that it was necessary separately to traverse these several parts of the consideration of such a count. So in the case of a count for goods sold and delivered, or for goods bargained and sold, it would be a proper traverse of the consideration for the *indebitatus assumpsit* to say, that no goods were sold and delivered (or that no goods were bargained and sold) by the plaintiff to the defendant. According to the old principles of pleading, a party was, generally, entitled to traverse his adversary's material allegation in the terms in which it was alleged. Under the Common Law Procedure Act, the defendant is bound to state the facts upon which he relies as constituting a defence; but he is also entitled under the express terms of the statute (s. 70), to make his defence by a material traverse; and it appears to me that he is entitled to make such traverse by denying any material single allegation in the terms in which it is made. According to the old rules of pleading (which forbade duplicity), if a party rested, in pleading his title on a seisin in fee, when he had only an estate for life, the opposite party was entitled to traverse the seisin as alleged; and unless it was proved as laid, the plaintiff failed. It might be argued that such an allegation involved two assertions; first, that he was seised, that is, had a freehold estate; and secondly, that such estate was an estate in fee; that is, that it comprised a statement of the quality and of the quantity of the estate; and yet such a traverse was not treated as too large. So, in an old case, cited in *Stephens on Pleading*, p. 290, *Wood v. Budden* (a):—“In an action of trespass, for trespasses committed in a close of pasture, containing eight acres, in the town of Tollard Royal, the defendant pleaded, ‘that W. Earl of Salisbury was seised in fee, and of right, of an ancient chase of deer, called Cranborn, and that the said chase did extend itself as well in and through the said eight acres of pasture as in and through the said town of Tollard Royal; and justified the trespasses, as committed in using the said chase. The plaintiff traversed, that the said chase extended itself as well in

(a) Hob. 119.

"the eight acres as to the whole town ; and issue being taken M. T. 1858.
"thereon, it was tried, and found for the plaintiff. It was then
"moved, in arrest of judgment, 'that this issue and the verdict
"were faulty; because, if the chase did extend to the eight acres
"only, it was enough for the defendant; and therefore the finding
"of the jury, that it did not extend as well to the whole town as
"to the eight acres, did not conclude against the defendant's right
"in the eight acres, which was only in question. But it was
"answered by the Court, that there was no fault in the issue, much
"less in the verdict (which was according to the issue); but the
"fault was in the defendant's plea, for he puts in his plea more
"than he needed, viz., the whole town; which, being to his own
"disadvantage, and to the advantage of the plaintiff, there was no
"reason for him to demur upon it, but rather to admit it, as he did,
"and so to put it in issue. And so judgment was given for the
"plaintiff."

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I do not mean to say that in this case there is any fault in the plaintiff's pleading. It states a qualified act of the plaintiff, namely, her having entered the defendant's service under a certain agreement, as an essential matter to sustain the action. It might have stated, in two distinct averments, that there was an agreement between the parties that the plaintiff should enter the defendant's service on certain terms, and that thereupon she did so enter. But the plaintiff prefers the former, which is a shorter but not less intelligible form, stating one qualified act, as giving to her the right to the notice, of the omission of which she complains. I am afraid, if we should hold that this allegation, blended into one by the plaintiff, ought to be divided by the defendant for the purpose of traversing it, that we should lay down a rule very embarrassing to parties in their pleading. It would be necessary, in so dividing it, to depart, with some risk, from the allegation traversed. The issue now tendered by this traverse is a very intelligible one, and cannot embarrass either of the parties at the trial. The plaintiff cannot prove her case, nor can the defendant make out her defence, without entering into the circumstances of the agreement. The question is really one of the construction of the pleadings; is it the statement

M. T. 1858. of one qualified act upon which the plaintiff relies? If it is, the traverse is good. If it be not, but the statement of two distinct material things, the traverse is objectionable. The principle is unquestioned, that where there are distinct material averments they must be traversed separately, if they be both traversed at all.

RICHARDS, B.

I concur with my LORD CHIEF BARON. I think the pleading ought to receive the most convenient construction. This is not an action for services; it is an action by the plaintiff for dismissing her without notice. The *gravamen* of the action is that she entered into the service of the defendant, under an agreement which entitled her to notice before she was dismissed. The defendant says, she did not enter into his service under an agreement which entitled her to notice before she was dismissed. Now I think that one defence founded on two matters certainly; and it would be very embarrassing to parties if the defendant were bound to read as two facts what the plaintiff has himself treated as a single averment. I think, upon the whole, that this is the most convenient form of pleading.

GREENE, B.

I regret to say I cannot concur with the rest of the Court. I think this pleading is objectionable under the Common Law Procedure Act. It appears to me that we ought not to decide matters of this kind according to the old rules of pleading, but according to the policy and provisions of the Common Law Procedure Act. The object of that Act was to reduce the questions between the parties to the narrowest possible compass; and accordingly it enacts that whatever is not distinctly traversed is to be considered as admitted. What is the action in this case? It is an action for wrongfully dismissing the plaintiff, contrary to the terms of a special agreement. I do not consider the summons and plaint ambiguous. I think the plaint is perfectly intelligible. The averment of the plaintiff having by agreement entered into the service of the defendant consists of

two facts; I do not understand the difference between two facts and two matters; I say it involves cumulatively two facts: first, that there was an agreement, and secondly, that there was a service in pursuance of it. It is just the same, in my mind, as if the plaintiff had said "there was an agreement of a certain nature between you "and me; by virtue of that agreement I entered into your service, "and, contrary to that agreement, you dismissed me." There is an allegation of an agreement and of a service, a traverse of either of which amounts to an answer to the action. If the defendant can prove that there was no agreement at all, or that there was an agreement different from that alleged, the action must fail; so also it must fail if the defendant can prove that there was no service. These are two distinct defences, and the policy of the Common Law Procedure Act requires that they should be separately pleaded, and not mixed up in one defence. Suppose the defendant had come into Court with an application to plead those defences separately, and it appeared indisputably that there was a service, the Court would not allow, at least I for one would not allow, a defence traversing that fact. If there should be separate issues in this case, and the defendant should fail upon the issue whether or not there was a service, he would have to pay all the costs of that issue. That liability is evaded by this mode of pleading, because he gets here an opportunity of denying the agreement, though the question of service has been proved against him. It is here avowed by Counsel that the fact is intended to be controverted under this defence. The defendant has given notice to the plaintiff to come prepared with witnesses to prove that fact; the plaintiff may succeed on that part of the case, and yet he will not have the expense thus incurred, although the defendant do no more than disprove the agreement, and have that part found for him. The result of this pleading may thus be to put upon the plaintiff the necessity of bringing a great many unnecessary witnesses to prove what the defendant at the trial may not controvert. Counsel now says he means to controvert the service, but he may at the trial say he never disputed it. The plaintiff, as it appears to me, has a right to know from the defence what part of his allegation is disputed, and what admitted; and

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M. T. 1858. therefore this pleading ought to be divided into two parts. I think
Eschequer. the plaintiff's motion is well founded, and that we cannot, consist-
WINTON. ently with the plain policy of the Act, sanction this mode of
v.
MOORE. pleading.*

* PENNEFATHER, B., *absente.*

BROPHY v. JONES.

Nov. 4, 8.

Sembler.—A certificate under the 97th section of the Common Law Procedure Act, 1856, will not be sufficient unless given by the Judge *at the trial.*

But where at the trial, a certificate was obtained by the plaintiff that the case was a fit one to be tried by a special jury, which special jury, in fact, had been struck by the defendant, and on the following day the Judge amended the certificate by adding, that the case was a fit one to be tried in the Superior Courts: Held, that the certificate given at the trial was rightly amended, and might be sustained as one within the 97th section.

THIS was an action for false arrest and imprisonment, and was brought by the plaintiff, Anne Brophy, against the defendant John Gore Jones, one of the resident Magistrates for the county of Tipperary.

It appeared that the plaintiff and the defendant resided within the jurisdiction of the Civil-bill Court for the county of Tipperary, and that the alleged cause of action arose in that county. The case was tried before the LORD CHIEF BARON and a special jury of the county of Dublin, on the 26th of October, and following days, when a verdict was found for the plaintiff, with sixpence damages. At the close of the trial, on the 28th of October, an application was made by the plaintiff's Counsel to the LORD CHIEF BARON for a certificate on the record that it was a fit cause to be tried by a special jury; and accordingly his Lordship indorsed upon the record and signed the following certificate:—"I certify that this was a proper case to be tried by a special jury." No application for any other certificate was at that time made, although the order for a special jury had been in fact obtained upon the application of the defendant. On the following morning, the 29th of October, the plaintiff's Counsel made an application, *ex parte*, to the LORD CHIEF BARON, at his residence, for a certificate under the 97th section of

the Common Law Procedure Act, 1856, 19 & 20 *Vic.*, c. 113, that it was a fit case to be tried in the Superior Courts, or for an amendment of the certificate already given. His Lordship refused to hear the application, as being *ex parte*, and directed notice to be given to the defendant's attorney, which was accordingly done, and the motion was then renewed on the following morning. His Lordship intimated his opinion that he had no jurisdiction to give the required certificate ; but in order that the plaintiff might not be precluded from raising the question before the Full Court, he granted, *pro forma*, a certificate that it was a proper case to be tried in the Superior Courts, reserving liberty to the defendant to move the Full Court to set aside the certificate.*

A motion, accordingly, was on this day made, to set aside and expunge from the back of the abstract of Nisi Prius so much of the certificate of the LORD CHIEF BARON, indorsed thereon, as certified that this was a proper case to be tried in the Superior Courts.

G. Fitzgibbon, with him *R. Armstrong*, in support of the application.

We submit that the certificate given at the trial is not such a one as will entitle the plaintiff to costs under the 97th section of the Common Law Procedure Act, 1856, and that the one subse-

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* The 97th section of the Common Law Procedure Amendment Act, 1856, enacts that, " If in any action of contract brought after the commencement of this Act, in the Superior Courts (save for breach of promise of marriage), when the parties reside within the jurisdiction of the Civil-bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than twenty pounds, or in any action for any wrong or injury disconnected with contract (not being for replevin, slander, libel, malicious prosecution, seduction or criminal conversation), a sum not exceeding five pounds, the plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause the Judge shall certify on the back of the record, either that the case was one which could not be tried in the Civil-bill Court, or that, although within the jurisdiction of the Civil-bill Court, it nevertheless was a fit cause to be tried in such Superior Courts, or (in case there shall be no trial) unless the Court or a Judge shall, on motion, make an order to the like effect ; and in case there shall be no such certificate or order, it shall not be necessary to enter any suggestion on the record to deprive the plaintiff of his costs."

M. T. 1858. *Exchequer.* *Brophy v. Jones.* quently given will not carry them, because it was not, in the words of the statute, given "at the trial." It is said the certificate given at the trial necessarily amounted to a certificate that the case was fit one to be tried in the Superior Courts, because there could not have been a special jury anywhere else; but that does not follow, for if the case had been tried in the Civil-bill Court it need not have been tried by a jury at all. Even if the *LORD CHIEF BARON* was of opinion that it was a fit case to be tried in the Superior Courts and gave this certificate under that impression, that is not enough, because the section enacts, not only that he shall entertain the opinion, but express it by indorsement upon the record. No presumption, however, as to the intention of the Judge can now be made. If the certificate is sufficient as it stands, why have it amended? Again, the second certificate was given too late. The words of the statute are express, "unless at the trial the Judge shall certify." Cases may be cited in which it was held that certificate given within a reasonable time after the trial were sufficient, but those cases were decided upon Acts of Parliament different in their language from the present. *Tharratt v. Trevor* (*a*) was decided on the 9 & 10 Vic. c. 95, s. 129, by which no time was limited for the giving of the certificate. *O'Niel v. Egan* (*b*) is not an authority in point, for the words of the 126th section of the Common Law Procedure Act, 1853, upon which the question turned, are different, and the discussion was adjourned to Chamber by consent. *Johnson v. Stanton* (*c*) was decided on the 22 & 23 Car. 2, c. 9, and the Court held that "the Judge at the trial of the cause" meant "the Judge who tried the cause," which appears to be a strained construction of the Act; at all events, the words here could not be so construed, for they are "at the trial the Judge," as if the Legislature were determined to prevent the possibility of such a construction being given to the present Act. The words of the Special Jury Act, 3 and 4 W. 4, c. 91, are "immediately after," which have been held to mean "within a reasonable time after;" but this Act is different. At Common Law, the plaintiff is not entitled to any costs, but they

(*a*) 6 Exch. 187.

(*b*) 6 Ir. Jur. 347.

(*c*) 2 B. & C. 621.

have been given him by statute, and in particular cases the statute which gives him costs has been repealed, and he has been remitted to his Common Law right, unless the Judge, by a certain act done at a certain time, confers upon him the right to costs. The Judge's jurisdiction is ousted unless he pursues the mode pointed out by the Act; that is, unless he certifies "at the trial." The argument at the other side comes to this, that "at the trial" and "after the trial" are synonymous terms.

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C. Rolleston and D. Lynch, contra.

The section cannot be literally interpreted; for if the certificate must be given "at the trial," a minute after the trial will not do; and therefore the rational construction is, that it should be given within a reasonable time after the trial, while the facts upon which the certificate is to be founded are fresh in the mind of the Judge. That was the reason of the decision in *Johnson v. Stanton*, where the certificate was given four days after the trial. In *Thompson v. Gibson* (*a*), a certificate under the 3 & 4 Vic., c. 24, s. 2, was given after the termination of the trial, and held good; and some of the reasons for the decision, viz., that it was not required to be given in open Court, or upon the application of Counsel, apply to the present case.

The same rule was laid down in *Bodkin v. Leahy* (*b*), with respect to the certificate for a special jury, given two months after the trial; and in *Butler v. Cozens* (*c*), the case was adjourned to see if the Judge who tried the case would certify. Great inconvenience would follow from the construction suggested by the defendant, and it is contrary to practice; for suppose at Assizes, that a Judge is obliged to leave the town, and his Registrar by consent takes the verdict, is it to be said that a certificate cannot be given? In *Woolley v. Whitby* (*d*), the words "at the trial" occurred, and yet a certificate given after it was held sufficient. At all events, the certificate can be sustained as an amendment—it was asked for by

(*a*) 9 Dowl. P. C. 717; S. C., 8 M. & W. 281.

(*b*) 3 Ir. Com. Law Rep. 36.

(*c*) 11 Mod. 196.

(*d*) 2 B. & C. 580.

M. T. 1858. the plaintiff, who had not got the special jury, and would have been senseless if it had not been obtained under the impression that it would carry those costs. We may assume it was given by the Judge under the same impression. In *Toone v. Garvey* (a), the certificate was actually referred back to the Judge for amendment. Here the application was made, and granted by the Judge, with the object of entitling the plaintiff to costs; but by a misprision of the Counsel, the wrong form of certificate was applied for.

R. Armstrong, in reply.

It is said the mistake in this case was owing to the misprision of Counsel, but that is no ground for relieving the defendant, there being no allegation of surprise or fraud. No case has been cited in which the words "at the trial" have been held to mean "after the trial." In *Johnson v. Stanton*, the language of the Act was strained to meet the justice of the case, and the present section almost amounts to a legislative declaration that "at" is an advert of time, and not of description. The ground of the decision in *Woolley v. Whibley* was that the words "at the trial" were referred to the other member of the sentence only, "if it shall appear," not to the giving of the certificate.

Cur. ad. ult.

Pigot, C. B.

Nov. 8. In this case, I was applied to, on the part of the plaintiff, at the close of the trial (which took place at the Adjourned Sittings), for a certificate that it was a proper case to be tried by a special jury. That certificate I then signed on the record. On the morning after the verdict (the Adjourned Sittings having then closed), I was asked to sign a certificate that, although within the jurisdiction of the Civil-bill Court, the case was a fit case to be tried in a Superior Court. That certificate the 97th section of the Common Law Procedure Act of 1856 (19 & 20 Vic., c. 113) requires to be given "at the trial." My impression, at the time of the application, was that it was too late. It was, however, urged, that the certificate as to the

special jury was, in substance, a declaration that the case was a fit one to be tried in a Superior Court (where only, of course, it could be tried by a special jury); and that what I was called upon to do was in effect only to make an amendment of the certificate which I had given, and which would be abortive if the addition applied for were not made. The result of the application was, that I added the certificate as desired, with a view to the opinion of the Court being taken as to its validity, upon a motion to set it aside. That motion has, accordingly, been made, and we are of opinion that it must be refused.

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The motion was rested, in argument, on the ground that the certificate was too late; having been given not "at," but "after," the trial.

It was resisted on the two grounds; first that, by analogy to the interpretation given to other statutes *in pari materia*, the certificate ought to be considered as given in due time; secondly, that it ought to be considered as an amendment of the certificate granted at the trial, and as doing no more than giving effect to that certificate, and executing the purpose for which it was given.

We are of opinion that the certificate is to be sustained upon the second of these grounds. We must consider the question, not by inquiring by parol what the Judge intended, but by the fair import of the acts which have been done, and by the documents before us. The certificate that the case was a fit one to be tried by a special jury was given at the instance of the plaintiff, who alone was interested in obtaining it. The purpose for which it was sought, and the purpose for which it was granted, are clear; they appear upon the document, and by reference to the statute which authorised it. The only purpose of giving such a certificate is, to enable the party who obtains the verdict to have the costs of the special jury; and these he cannot have unless as part of his costs of the action. It is immaterial whether the certificate was given under the mistaken belief of the plaintiff's Counsel in seeking it, and the Judge in granting it, that the order for a special jury had been obtained by the plaintiff, when in point of fact it had been obtained by the defendant. It would have been senseless

M. T. 1858. and idle to grant such a certificate at all, if the order were not obtained by the party who obtained the verdict; for that party would not need it for obtaining the costs of a special jury, struck at the instance of his adversary, against whom the verdict was given at the trial. When the Judge granted this certificate, he must have done so, determining that it was a fit case for a trial before a special jury, which could only be had in a Superior Court, and a fit case for giving the costs of the special jury to the plaintiff as part of his costs in the action—a purpose which could not be accomplished, since the amount of the verdict did not exceed £5, unless the Judge was of opinion that the case was a fit one to be tried in a Superior Court. The certificate given at the trial, therefore, in effect, necessarily imported and conveyed that opinion; and that being so, it is consistent with authority, as well as with reason, that, where it is wanting in form the deficiency may be supplied.

Two cases were cited in the course of the argument, the principle of which appears to apply directly to the case now before us. In *Shuttleworth v. Cocker* (*a*), a certificate, inadequate in form, was given under a statute which denies the plaintiff costs in England, unless the certificate be given “immediately after the trial.” It was held that it might be amended by the Judge. That was a very strong decision; because the amended certificate, which the Court ultimately upheld, was given pending a motion to set aside the first certificate as insufficient; and the Court intimated a strong opinion, that if, at the time of the amendment, the certificate had been given for the first time, it would have been too late. A similar decision was made by this Court, in *Toone v. Garvey* (*b*). There, a certificate was given by the Judge who tried the case at the Assizes, under one section (the 126th) of the Common Law Procedure Act, for the purpose of giving the plaintiff his costs; it was found to be ineffectual. The Court made an order, in a subsequent Term, that the learned Judge should be at liberty to amend his certificate, and it was accordingly amended, by adding a certificate, under another section (the 243rd) of the statute.

(*a*) 1 Man. & G. 829.

(*b*) 9 Ir. Jur. 48.

As we decide the motion on this ground, it is of course unnecessary to pronounce definitely an opinion upon the other; but, as it has been much discussed, and is a matter of some importance, I do not think we ought to dismiss the case without noticing some of the topics which have been urged in reference to it in the course of the argument. The words of the statute are brief, simple and clear; they are—"unless, at the trial of such cause, the Judge shall certify." The plaintiff's Counsel contend that this means "a reasonable time after the trial;" and they argue that the statute ought to receive that construction because, upon a more strict interpretation, compliance with it would be impossible; for the trial must, in every case, be at an end before the certificate can be given. They further refer, in particular, to two cases, *Johnson v. Stanton* (*a*) and *Woolley v. Whitby* (*d*), in support of this reasoning. Now, with respect to those cases, *Johnson v. Stanton* was determined upon the statute 22 & 23 Car. 2, c. 9, in which the words (withholding costs where there is not a certificate) are—"in all cases of assault and battery, wherein the Judge, at the trial of the case, shall not find and certify." The certificate was granted four days after the trial. The Court held that the words "the Judge at the trial of the cause" meant the Judge who tried the cause, saying that the language cannot be expounded literally, because the certificate cannot be granted *at* the trial, but only *after* the trial, when the jury have found their verdict. They also considered this construction the most convenient for the administration of justice, as it gave the Judge time to consider of the certificate. There, however, the language of the statute was by the Court deemed capable of the construction by which the words "at the trial" were treated as only descriptive of the Judge, and not as indicating the time of granting the certificate; that is, that the words "at the trial" were governed not by the words "find and certify," but by the word "Judge." But the words of the statute before us are not coupled with any terms which afford that alternative in their construction; for the words are, unless, "at the trial of such cause, the Judge shall certify." There is no term but "certify" to which the words "at the trial"

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M. T. 1858. can be referred. The case of *Woolley v. Whitty* appeared to me at first to be in effect very nearly identical with the case before us; but, on consideration, I think the Court, in their judgment, must be understood as there expounding the statute of 8 & 9 W. 3. c. 11, s. 4, in the manner explained by Mr. Armstrong in his argument. The words of the statute (section 4) are—"wherein, at the trial of the cause, it shall appear *and* be certified by the Judge." Here two things are specified; first, the matter must appear at the trial; secondly, it must be certified by the Judge. The words "at the trial" were certainly capable of being connected with both members of the clause; but the Court held that they were also capable of being confined to that which immediately follows them: and they read the statute as requiring two things: first, that at the trial the matter must appear; and, secondly, that it must be certified by the Judge; but that it might be so certified not at the trial, but at a convenient time afterwards. In the statute before us, there are not any additional words which furnish grounds for a similar construction—none to which, except the term "certify," the terms "at the trial" can be applied.

I am sensible of the difficulty of dealing with the Act of Parliament now under our consideration, and of determining in all cases the point of time when, with a view to the granting of the certificate, the trial shall be considered at an end. If a Judge who tries civil cases in a Circuit town is obliged, before the jury in the last civil case have given their verdict, to leave that town, in order to open the Commission in the next Assizes town of the Circuit, and if the Judge who is associated with him in the Commission takes the verdict of the jury, it will be of course impossible for either Judge *at the trial* to grant the certificate. The one knows nothing of the case; the other is in a different county. So, where a verdict is taken by consent by the Registrar, in the absence of the Judges, a similar difficulty may arise. How these difficulties are to be met, we have not now to determine; they are not of our making. Whenever we shall be called upon to construe these words of the Legislature, we must deal with them as we find them. Upon the present motion, as I have already said, it is not necessary for us to

determine their construction; for we dispose of the motion on another ground. But it is right that it should be fully understood that no one of us is at present prepared to decide it on the ground that the certificate, if treated as an original certificate first given at the time when it was amended in Chamber was not too late. In plain terms, I, for one, would find great difficulty in saying that "at" means "after," or that "present" is synonymous with "future." We do not mean at all to intimate that, if the Judge be applied to for a certificate at the close of the trial, it is not quite competent to him to adjourn the matter for further consideration, and, upon such consideration, afterwards to sign it, as if granted when applied for at the trial. It is greatly to be lamented that, in preparing Acts of Parliament upon subjects such as this, those who frame them should not advert to statutes *in pari materia*, which have already received a known construction. In reference to certificates such as those which have been the subject of discussion before us, a variety of enactments have been made, employing (it is difficult to conceive why) different forms of language, in providing for identically the same thing, viz., in prescribing the manner in which the Judge shall do the very simple act of granting a certificate. One enactment (*a*) requires the certificate to be granted "immediately after the trial," in open Court; another provision (*b*) requires that, "at the trial of the cause it shall appear and be certified by the Judge;" another (*c*) withholds costs in certain cases wherein "the Judge, at the trial of the cause, shall not find and certify." In England, in reference to a certificate (*d*) exactly analogous to the certificate now before us (*e*), that is, intended to give to a plaintiff his costs, where the case, being within the jurisdiction of the Inferior Court, is nevertheless, in the opinion of the Judges, a fit case to be tried in a Superior Court, there is no such limitation as to the time at which the certificate is to be granted. Accordingly, in *Tharratt v. Tre-*

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(*a*) 8 & 9 W. 3, c. 11, s. 1, "immediately afterwards:" 3 & 4 Vic., c. 24, s. 2.

(*b*) 8 & 9 W. 3, c. 11, s. 4.

(*c*) 16 & 17 Vic., c. 113, s. 126 (*Jr.*); 22 & 23 Car. 2, c. 9, s. 34 (*Eng.*);
see 3 & 4 Vic., c. 24, s. 2.

(*d*) 9 & 10 Vic., c. 95, s. 129 (*Eng.*). (*e*) 19 & 20 Vic., c. 113, s. 97.

M. T. 1858. *or (a)*, it was determined that such a certificate may be given at any time before the taxation of costs. In England and in Ireland certificates in actions of trespass, that a battery has been proved, or that the freehold or title to land come in question, may, according to *Johnson v. Stanton*, be given after the trial. I trust that those who are charged with the consideration of the amendment of our laws will consider whether some Act, or clause of an Act, ought not to be passed, to remedy the inconvenience which must arise in case such as those which I have mentioned, from a strict and literal application of the terms of the statute before us; or at all events to make a uniform provision for the time and manner of granting such certificates.

Upon the grounds which I have already stated, the motion was refused.

PENNEFATHER, B.

I shall just say, with regard to the difficulty suggested by my LORD CHIEF BARON, where the Judge at Assizes leaves the town, or the verdict is taken by the Registrar, that that circumstance does not prevent an application being made to the Judge, when the jury retire, in case there should be a verdict for the plaintiff; and that application, I think, would be sufficient.

RICHARDS, B., concurred.

GREENE, B.

I also concur. With regard to the case of *Woolley v. Whitby*, it was argued in the present case that a distinction was there taken by the Judges between the 1st and 4th sections of the statute 8 & 9 W. 3, c. 11. Now I take that not to be so. It was argued in *Woolley v. Whitby*, that the two sections ought to receive the same construction, and what the Court said was in answer to that argument; but they decided, upon the language of the 4th section, *per se*, that no time was specified with regard to the giving of the certificate.

(a) 6 Exch. 187.

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In this case, *P. Creagh* had, on the 18th of August last, obtained an order from O'Brien, J., in Chamber, under the 63rd section of the Common Law Procedure Act, 1856, whereby it was ordered that the two several judgments recovered by the defendant against John Farrall, as of Michaelmas Term 1856, for the several sums of £1550 and £394, should be, and they were, thereby attached, to answer the plaintiff's debt of £225. 1s. 6d. and £7. 9s. Od. costs, to the extent of said debt and costs, without further notice; and it was further ordered, that the said John Farrall should appear on the 2nd day of November, and show cause why he should not, out of the amount due by him to the defendant, on said judgments, pay to the said plaintiff the said sums of £225. 1s. 6d., and £7. 9s. Od. costs, in satisfaction of his said judgment debt.

It appeared that J. B. Younge, the defendant, was owner of a leasehold interest in a house and 108 acres of land in the county of Kildare, held for a term of sixty-one years, under a lease of the 12th of February 1852, at the yearly rent of £180; that in November 1856, he sold to J. Farrall, the garnishee, the furniture in the house, for a sum of £197, and also agreed to sell to him his interest in the lease of the 12th of February 1852. Upon the occasion of that sale, on the 29th of November 1856, two bonds were executed; one for the penal sum of £394, conditioned for the payment, without interest, on the 1st of October 1861, of £197, the price of the furniture; and the other for the penal sum of £1550, conditioned for the payment, without interest, of the sum of £775, on the 1st of October 1863. On the same 29th of November 1856, J. B. Younge demised the house and lands to Farrall, for a term of seven years, from the 1st of August 1856, at the yearly rent of £300; and an agreement, of same date, not

A debt due by a third party, but not payable until a future day, is within the garnishee clauses of the Common Law Procedure Act, 1856, and may be attached.

The mere possibility that when the day of payment arrives, there may be a defence against the recovery of the debt, is no ground for resisting an attachment order.—[*Per* Froot, C. B.]

In this case, the Court discharged the conditional order to pay, but allowed the attachment order to stand.

M. T. 1858. under seal, was entered into, and signed by both parties. A statement of the agreement will be found in the judgment of the Low CHIEF BARON. An affidavit was made by J. Farrall, the garnishee, in which he stated that the judgments referred to in the agreement, and which were the subject of the garnishee order, were still outstanding and unpaid, and that he had no intention of paying them off before the periods agreed upon. Cause having been shown on behalf of the garnishee, against the conditional part of the order, upon the opening of the motion, it was admitted by the plaintiff's Counsel, that the order to pay the money could not be sustained; but the garnishee's Counsel insisting that the attachment order also should be set aside, it was suggested by the Court that the case should be argued as if upon a motion to set aside the order. Accordingly, the case was now argued by—

William A. Exham and *E. Beytagh*, for the garnishee.

We have it now admitted, on the part of the plaintiff, that the conditional order to pay must be discharged; and it follows, as a necessary consequence, that the attachment order also must be set aside. *Wintle v. Williams* (a) shows that where the order to pay has been discharged, it was not the intention of the Act to leave the attachment order pending over the garnishee. It would be a great hardship upon him if the law were otherwise. Even if that case does not govern the present, there is no debt due by the garnishee, capable of being attached. The Act contemplates only the attachment of debts payable *in praesenti*; for it says the service of the attachment order on the garnishee "shall bind such debts in his hands;" it speaks of an execution issuing immediately, and gives but one defence to the garnishee against the judgment debtor, viz., payment. The Act, therefore, contemplated that there should be no interval of time between the attachment and payment.—[GREENE, B. There must be a debt established; but is your argument this—that a debt absolute, but not payable until a future day, is not liable to be attached? Take the case of a bond, conditioned for the payment of £500, two years hence. Is

(a) 3 Exch., N. S., 286.

Johnson v. Diamond (*a*), Parke, B., says:—"I agree that if the M. T. 1858.
 "bond had not been conditioned for the payment of a sum certain,
 "or a sum capable of being ascertained without the intervention
 "of a jury, the statute would apply."]—In *Johnson v. Diamond*,
 the debt there in question was held not to be attachable, and the
 judgment must be read *secundum subjectam materiem*. Here, there
 is clearly no absolute debt; for the amount of the judgment might
 never be recoverable as between Younge and Farrall. Take the
 case of the larger judgment. Young was bound to assign the
 lease free from incumbrances; and, supposing it were ascertained
 that incumbrances had been created by him, would not that be a
 defence against the payment of the amount of the judgment? The
 payment is conditional upon events which, possibly, may not
 happen; and it is more than probable that, when the day of
 payment arrives, Farrall may have a good defence (in Equity at all
 events) against the payment. There is, certainly, no unconditional
 absolute debt due by Farrall; and the statute, it is submitted, was
 intended to apply only to clear cases.

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The attachment order must stand. The proposition for which we contend is this, that wherever a debt exists, it is not the less attachable because it is payable on a future day. The language of the statute could not be satisfied by any other construction: the debts attachable under the 63rd section are "all debts owing or accruing from such third person;" and if these judgments constitute a debt, they are clearly "accruing" debts within the meaning of that section. *Wintle v. Williams* has been cited to show that, where the order to pay is discharged, the attachment order also must be set aside; but the case does not establish any general proposition of that kind, although, in that particular case, such was the course adopted. In *Hirsch v. Coates* (*b*), the attachment order was allowed to stand, upon a principle which applies directly to this case, that the plaintiff cannot get from the garnishee anything to which the judgment debtor was not entitled. We shall have all our

(*a*) 11 Exch. 73.

(*b*) 18 C. B. 757.

M. T. 1858. judgment debtor was entitled to at Law and in Equity. It is quite clear, that a debt payable at a future day was attachable under the custom of foreign attachment. *Dalton v. Selly*, as reported by *Croke*, is the only authority to the contrary; but *Croke's* report is not correct, as appears by the note to *Croke Eliz.*, p. 712, and the report of the same case in 3 *Leonard*, p. 236; *Ashley & Attachment*, p. 26. Again, the amount due on foot of the judgments is a debt; the agreement is not under seal, and cannot, at Law, operate as a defeasance, no matter what its construction may be; and, in Equity, there would be no ground for enjoining any proceeding to recover them; for the agreement provides that the money shall be paid at all events. One judgment was given as the price of the furniture, and the other as the price of the leasehold. The collateral agreement in effect says, if those debts be paid, the rent shall be reduced; but there is nothing in it to relieve the debtor from the obligation to pay. The inconvenience of the construction for which we contend has been relied upon; but the inconvenience is no greater than exists upon every assignment of a *chase in action*; for the debtor, after notice, is bound to pay the assignee. At all events, the statute imposes the obligation, which is a complete answer to the argument.

E. Beytagh, in reply.

A debt payable *in futuro* was not attachable under the law of foreign attachment. The position in *Com.*, tit. *Attachment*, C, is not borne out by the authorities cited in support of it. *Dalton v. Selly* (a) is cited; but that decides the contrary proposition—"A foreign attachment cannot be of a debt before it be due."—[*Greene*, B. The note to *Leuknor v. Huntley* (b) states "Lord Chief Baron *Comyns*, 1 *Dig.*, p. 424, says, this case and the case of "*Dalton v. Selly*, ante, p. 184, seem mis-reported."—*Pigot*, C. B. *Dalton v. Selly* is also reported in 3 *Leonard*, differently from the report in *Croke Eliz.*]—There is no reason to think the report given by *Croke* is incorrect; and the rule laid down in *Comyns' Digest* is founded altogether upon *Dalton v. Selly*. In the note

(a) Cro. Eliz. 184.

(b) Cro. Eliz. 712.

to *Roberthon et uxor v. Norroy* (*a*), it is laid down — “Foreign attachment of a debt cannot be before the day be come.” The notes to *Dyer* are high authority : *Milward v. Thatcher* (*b*). The passage in *Roll. Abr.*, p. 553, *pl. 10*, does not bear out the proposition in *Comyns*; and from the next *placitum* in *Rolle*, the opinion of the author would appear to have been that there may be a special custom to justify it; but that if there be, it must be pleaded specially.

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The construction contended for would lead to great inconvenience : the garnishee would have imposed on him the obligation of taking notice of every attachment order, and would be in great danger of paying the wrong party. The Legislature could not have intended, by giving this summary remedy to creditors, to place debtors in so embarrassing a position.

Cur. ad. vult.

The judgment of the Court was now delivered by—

PICOT, C. B.

In this case an order was obtained in Chamber on the 18th of August, attaching two debts, due on judgments obtained by the defendant against John Farrall, the garnishee in the order; and also directing (in the usual form) that the garnishee should appear and show cause why he should not pay the plaintiff's demand out of the sums due on the judgments. The garnishee appeared and showed cause against the conditional part of the order, on the ground that the judgments were obtained upon bonds, each conditioned for the payment of a principal sum, on a future day not yet arrived; and that they were further contracted by a collateral agreement in writing between the obligor and the obligee. On the appearance of the plaintiff and the garnishee, it was admitted that the conditional order to pay the money could not be sustained; and accordingly we determined that the cause shown should be allowed. But the garnishee's Counsel insisted that the attachment order ought to be altogether discharged; and it was arranged, by consent (to save the necessity of a motion to set it aside), that the question, whether it

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(*a*) *Dyer*, 83 *a*.

(*b*) 2 *T. R.* 81.

M. T. 1858. should be discharged, should be argued without the service of a notice of motion for that purpose. On the argument, the garnishee's Counsel contended, first, that upon the terms of the collateral agreement, the judgments were not obtained to secure absolute debts, but were (or at least that one of them was) subject to contingencies, and to acts to be done at the option of the garnishee; and the debts were of a nature which exempted them from attachment. Secondly, that being, at all events, debts payable at a future day, they were not liable to attachment, such debts not being within the attachment section of the Common Law Procedure Act; and, in support of this construction of the statute, they contended that a foreign attachment (a proceeding from which the statute has borrowed a part of its language) did not lie against a debt secured by a bond conditioned for its payment at a day not yet arrived; and that the statute ought to receive a corresponding construction.

We are of opinion that so much of the order as attached the debts was right, and ought not to be disturbed. In my judgment, none of the propositions contended for in the argument of the garnishee's Counsel can be sustained.

It appears that Younge the debtor was, in September 1856, the owner of a leasehold interest in a house and 108 acres of land, under a lease dated the 12th of February 1852, for a term of sixty-one years from the 1st of February 1852, at the yearly rent of £180, payable half-yearly, on the 1st of February and 1st of August.

In November 1856, Farrall, the garnishee, purchased from Younge the furniture then in the house, for £197. He also purchased Younge's interest in the leasehold; and on the 29th of November 1856, the two bonds in question were executed, one for the penal sum of £394, conditioned for payment on the 1st of October 1861, of £197, without interest, being the price of the furniture; the other for the penal sum of £1550, conditioned for payment, also without interest, of £775, on the 1st of October 1863. On the same day, Younge executed a lease to Farrall, demising to him the house and land, for seven years from the 1st of August 1856, at the yearly rent of £300, payable half-yearly. And by an agreement (not under seal), dated the same 29th of November 1856, disclosing these facts, it was agreed that if Farrall should pay to Younge the amount of the

lesser bond (being £197 without interest), on or before the day mentioned in the condition (1st of October 1861), the yearly rent of £300, reserved by the seven years' lease, should be reduced to £280; and that if Farrall should pay to Younge the amount of the larger bond (namely, £775 without interest), on or before the day mentioned in its condition (1st of October 1863), the yearly rent of £300, or of £280, as the case might be, should be reduced to £180; and that Younge should then forthwith execute to Farrall, at Farrall's expense, an absolute assignment of all his interest in the lease of the 12th of February 1852 (that is, the lease under which he held the lands), free from any incumbrance created after the date of the purchase of the lease; such incumbrance, if any, to be cleared at the expense of Younge. The agreement provided for the satisfaction of the judgments to be entered on the bonds, on payment of the sums respectively secured by them; and the agreement closed with a stipulation, that if Farrall should make default in payment of either of the respective sums of £197 and £775, when the same should respectively become due and payable, "then," in the words of the agreement, "the said James Brian Younge, his executors, administrators and assigns, shall be at liberty to take such proceedings on foot of the respective judgments so to be entered on said bonds respectively, for the payment of said sums of £197 and £775, as he or they may be advised, and as if this agreement had not been entered into and signed by the parties."

It was contended before us that, as Younge was bound to execute an assignment of the leasehold on payment of the amount secured by the larger judgment, the payment was contingent upon his making out title to the leasehold, or showing it free from incumbrances; and that therefore that judgment must be taken as a mere security for the result of a pending negotiation, or that it was a debt payable upon such an uncertain contingency that it ought not to be attached under the statute; and that at all events the agreement was so doubtful that the Court ought not to apply the Act of Parliament.

The agreement, so far as it applies to the matter before us, appears to me to be perfectly clear, though it is not technically or

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M. T. 1858. very accurately framed, and perhaps leaves without express provision some possible contingencies. As to the bond, and judgment entered on it, for securing the £197, it was given to secure the price of furniture sold to the obligor. It is quite plain that the plan of letting the lands contracted to be sold, at a profit-rent, was only a mode of indemnifying Younge for the money not being at once paid, and probably was designed by the parties from some notion that it was necessary for the purpose of avoiding the statutes against usury still remaining unrepealed. The £197 is stated in the agreement to be the price of the goods; and nothing was to be done upon payment of the amounts but the reduction of the rent and the satisfaction of the judgment. It was therefore clearly a debt payable, at the furthest, on the 1st of October 1861. With respect to the bond and judgment to secure the £775, it is not stated, in terms, to be for the price of the leasehold; but, upon the whole frame and context of the agreement, no doubt can exist that it was; and on the payment of that sum (which was to be made at farthest on the 1st of October 1863), nothing was to take place but the reduction of the rent, the satisfaction of the judgment, the conveyance of the estate; and, if there were any incumbrances, created after the purchase, the satisfaction of those. There was to be no deduction of title, and no question of antecedent incumbrances; for as to these, the contract plainly showed that the parties had already agreed. It is possible that if, when the time for payment should arrive, Younge should decline to execute a conveyance, or to satisfy incumbrances created subsequently to the purchase (if any such should appear), a Court of Equity might enjoin proceedings for recovering the judgment debt, notwithstanding the stringent terms of the last stipulation of the agreement, until the subsequent incumbrances should be satisfied, and Younge should be ready to convey the leasehold. On the other hand, it is possible that, should such a question ever arise, the contract may be treated by a Court of Equity as one of those in which, a security being given for the purchase-money payable at a certain day, the purchaser has been held bound to pay it at all events, and has been left, for obtaining a conveyance, to his remedy on the contract. If the former be the

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effect of this agreement, and if Younge should refuse or be unable to convey free from incumbrances subsequent to the purchase, it will be open to the defendant to present that case to the consideration of this Court, in answer to a future conditional order to pay the plaintiff's debt out of the amount of the larger judgment, when the day of payment shall have arrived. But the possibility that a future state of things *may* intervene before the day assigned for payment, and *may* create a defence against the recovery of the debt—which state of things *may* never arise—can constitute no ground for not attaching a legal debt, the price of a purchase which was only not payable at the time of the purchase, because, by an arrangement between the parties, the period for payment was postponed. It is plainly a debt, *solvendum in futuro*, and capable of being attached (if such a debt be at all capable of being attached) under this Act of Parliament.

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I should not have entered into this detailed examination of the agreement, if we had not been informed by Counsel (although this was disputed at the other side) that, when this matter was before one of the other Courts (where, however, I rather believe it was not much discussed, nor was the Court called upon to pronounce an opinion upon its construction), some doubt was expressed as to the import of the agreement. It was further contended that the statute, any more than the proceeding by foreign attachment, does not at all extend to debts payable at a future day. As to the proceeding by foreign attachment, to attach a debt payable on a future day, I own I was surprised to hear it gravely argued that such a debt could not be attached. There certainly was on this subject a conflict among the old authorities; they are collected in *Com. Dig.*, tit., *Attach.*, C and D; in *Dyer*, p. 83 *a*, in the note; in 1 *Roll. Abr.*, p. 553, tit., *Customes de London*, G; and in the corresponding title in *Viner's Abr.*, G, and *Bac. Abr.*, H. It was at one time thought that such a debt could not be attached; and it is plain that the Courts made some struggles against the application of the Custom of London to debts of that nature; but, ever since the case of *Robbins v. Standard* (a), in the reign of Charles the Second (deter-

(a) 1 Sid. 327; S. C., 2 Keb. 202.

M. T. 1858. *Sparks v. Younge.* mined in conformity with a former case of *Dalton v. Selly* (a), in the reign of Queen Elizabeth, but misreported in 1 *Croke*, p. 154. the rule appears to have been as stated in *Com. Dig.*, tit., *Attachment*, C :—"And money due upon a bond or contract may be attached before the day of payment; but there shall not be execution till a payment incurred." That the practice in the Lord Mayor's Court of London has been in conformity with the rule, appears from the *Privilegia Londini*, pp. 199, 296, from a note of the learned editor of the last edition of *Bacon's Abridgment* vol. 2, p. 596, and from Mr. *Ashley's* book on *Foreign Attachment* p. 26. It is also stated in a late book, *Pulling on the Laws and Customs of London*, p. 190, *note*. I cite these books merely as evidence of the practice. In *Ingram v. Bernard* (b), Lord Hardwicke treats as valid an attachment of a bond debt, "before the forfeiture of the bond;" and in the latter part of Lord Ellenborough's judgment, in *McDaniel v. Hughes* (c), he appears to me to assume that debts, *debita in praesenti solvenda in futuro*, are liable to foreign attachment. In the recent case of *Westoby v. Day* (d), the defendant pleaded, in bar of an action of debt on a bond, that the debt had been attached by a foreign attachment. In the plea, the Custom of London was set forth; and it was stated to be a part of the custom to attach a debt, "whether the same be then payable or become payable at a day to come." The debt in that case was described (p. 611) in the pleading as due upon a bond, conditioned to pay a sum of money on the 1st of January 1853; and it was averred "that the said sum was attached before" that day. The Court, on a demurrer to a replication to this plea, gave judgment for the defendant, without any objection having been taken to the validity of the custom, or to the time at which the debt was attached. On another replication, alleging that the Custom of Lon-

(a) 3 Leon. 236.

(b) 1 Lord Ray. 637.

(c) 3 East, 367.

(d) 2 Ell. & Bl. 605.

* NOTE.—Vide *Minors v. Bocher* (Noy. 68) and *Adler v. Clapper* (1 Red Abr. 553, pl. 3), from which it appears that, when the attachment is relied on as attaching a debt payable *in futuro*, the Custom must be alleged in the plea, to extend to these debts.

don did not extend to the attaching of debts, "the beneficial interest in which has become and is vested in a person other than" the original defendant, an issue was joined, as to the custom; and, on a *certiorari*, the Recorder of London certified that the custom did not extend to attach debts in which the beneficial interest was so vested. The attention of the Court and of the parties was therefore drawn to the custom; so that it is to be inferred that the custom to attach debts of this kind, before they were payable, was treated as a matter beyond controversy. I should not have thought this subject deserving of so much observation, if the point had not been so strenuously insisted on at the Bar. It is important that no doubt should be sanctioned respecting it. If there were any difficulty upon the construction of the garnishee clauses of the Common Law Procedure Act, the proceeding by foreign attachment, from which, as I have said, the statute takes a part of its language, might fairly suggest the inference that the Legislature, as to debts to be attached, did not intend to give to creditors a remedy less effectual than that given by the custom; but the language of the Act appears to me to be in itself abundantly clear. The 63rd section empowers the Judge, on an affidavit of a judgment creditor, stating, among other matters, "that any other person is indebted to his judgment debtor, and is within the jurisdiction," to order "that all debts owing or "accruing from such third person (hereinafter called the garnishee) "to the judgment creditor shall be attached, to answer the judgment debt." It sounds, doubtless, something like a solecism to say that a person is "indebted" in what is not yet "owing" from him. But such is the poverty of language, that it is difficult to avoid the occasional use of expressions of this kind; and when the words "accruing or owing" are used, as they plainly are in this section, to designate two classes of debts, they can receive each a distinct meaning, only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. The phrase "*debitum in praesenti solvendum in futuro*" is one well known and understood in our law. In a case of *Jones v. Thompson* (a), which was before the Court of Queen's Bench in

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Upon the whole, we are all of opinion that a debt, secured by a bond payable at a future day, is within the garnishee sections of the statute.

It was further contended that, as we allow the cause shown against the conditional part of the order, and decline to order payment, we ought, as a necessary consequence, to discharge also the attaching part of this order. The case of *Winstle v. Williams* (*a*) was cited in support of that argument; and some expressions of some of the Judges, in *Hirsch v. Coates* (*b*), were referred to as indicating that the attaching order was useless when the order to pay the money was refused. With respect to the case of *Winstle v. Williams*, the Court there held that the order to pay ought not to be made, because it appeared that the debt sought to be attached was held in trust for all the creditors of the original debtor. The whole debt was charged with that trust, and belonged in effect, as to the original debtor of the plaintiff in the proceeding, but to all his creditors. If the debt was sufficient to pay all the creditors, the plaintiff would be paid under the trust; if insufficient, the debt would be exhausted by the trust. Not only, therefore, was no part of the debt there applicable to the plaintiff's demand, but the Court probably considered that no part of it could be so at any future time. The language of the Court must be taken *secundum subiectam materiem*; and their decision in setting aside the attachment order should, I think, be treated as a determination that the debt before them was so circumstanced that, in their opinion, no order could be made for payment of it, or any part of it, to the plaintiff either then or at any future time. If the language of the Court were properly interpreted as laying down, as a general rule for the construction of the Act of Parliament, that whenever a conditional order to pay shall be discharged, then the order for attaching the debt must be discharged also, I should, with every respect, be obliged to say that I would not follow such a decision. It would, in

my judgment, be in direct opposition to the 63rd section of the Irish statute (analogous to the 61st of the English), which, in terms enacts that it shall be lawful for the Judge who orders the debt to be attached, "by the same, or *any subsequent* order," to order the garnishee to pay. The statute contemplates and conveys that meaning in the plainest language, that a debt *may* be attached at a time when the Court ought not yet to order it to be paid. And this was a necessary consequence of giving the power to attach debts "accruing," as well as debts "owing." The order to pay could not properly be made in reference to debts not "owing," that is, not payable; and this it may not be possible for the creditor who obtains the order to present to the Court, or to know, until cause shall have been shown against the conditional order to pay. Of that the present case is an illustration. And this view applies still more strongly to the Irish statute, which does not contain any section corresponding to the 60th section of the English Act, for enforcing discovery by the examination of the judgment debtor. It would be absurd to hold, that a garnishee who, in showing cause, shows an accruing debt in his hands, and therefore furnishes proof that it may be attached, though it ought not to be yet ordered to be paid, should, on that very ground, discharge the order for the attachment, which might be renewed the next day, on materials thus furnished by the garnishee himself.

It is singular that in *Wintle v. Williams*, decided in April 1858, no reference appears to have been made to the case of *Hirsch v. Coates*, decided in June 1856. An order was there made to attach a debt, coupled with a conditional order on the garnishee to pay, in the usual terms. Cause was shown against the conditional order, on grounds similar to those in *Wintle v. Williams*, namely, that the original debtor had by deed assigned all debts due or owing to him, with other property, to a trustee for such of his creditors as should execute the deed. On showing cause in Chamber, the garnishee declining to take an issue, the order was made absolute; and an application being afterwards made to the Full Court to set both orders aside, the Court discharged the order which directed payment, but allowed the attachment order to stand. Although one of the

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M. T. 1858. learned Judges intimated an impression "that the attachment order
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ought not to be set aside. And Lord Chief Justice Jervis (in
whose judgment Mr. Justice Cresswell concurred) stated his con-
struction of the statute to be, "that the order to attach all debts
owing or accruing to the judgment debtor, "binds all debts, and
"makes ultimately available to the execution creditor so much as
"may remain after satisfying all equitable claims thereon. If the
"debts are assigned, and the assignment swallows up the whole,
"then the judgment creditor gets nothing." He afterwards adds:-
"If the debtor has charged or parted with his interest in the
"debt, then, except as to any excess beyond the amount of the
"charge, no interest will go to the person obtaining the order." And he concludes by saying, "For these reasons, I think that
"though the first order," (namely, that which attached the debt)
"was right, the second order" (namely the order to pay) "was
wrong." Accordingly the second order only was set aside.
Whether, in such a case as that before the Court, in either of
those cases of *Winstle v. Williams* and *Hirsch v. Coates*, we
ought to follow the course adopted by the Court of Exchequer,
or that pursued by the Court of Common Pleas, it is unnecessary
for us to consider here. The event might, certainly, have arisen, that
the trust for the creditors might never have been made available;
that the deed of trust might have been successfully impeached, or
that from some other cause the trust might have failed. With
a view to such an event, the order of the Court of Common
Pleas, in *Hirsch v. Coates*, may have been the more provident
order, leaving to the creditor the security of his attachment
to await such a contingency. But having regard to the nature
of the debt in the case before us, we can follow the ruling
in *Hirsch v. Coates*, without opposing that in *Winstle v.
Williams*, where the Court had to deal with a debt placed in
circumstances wholly different from that before us; and, wholly
irrespective of either of those authorities, I am very clearly of
opinion that, in the present case, while we are bound to discharge
the conditional order to pay, we ought not to disturb the order

attaching the debt. I hold that opinion upon the nature of this debt, and the frame of the garnishee sections of the statute, which deal with debts accruing as well as owing, and which contemplate an order to pay as one which may be made either in conjunction with the attachment order, or separately, and at a subsequent time.

We were pressed with the supposed hardship to the garnishee, of allowing such an order to affect him for a considerable time, and the inconvenience of obliging debtors to preserve, for themselves or their executors, either the memory of such attaching orders or a registry of them. The answer is, that the statute has given rights to creditors which it was deemed important that they should have; and debtors must submit to the inconvenience of not being allowed to pay their own creditor a debt which the law has attached for the benefit of another to whom that creditor is indebted. If we set aside this attachment order, which now binds the debt under the express terms of the 64th section, another creditor may hereafter anticipate the present plaintiff, or the money may find its way, to his prejudice, into the hands of his debtor, before he shall again attach it. The length of time during which the order shall affect the garnishee results from the terms of his own bond, and may be shortened by an early payment, according to the terms of his collateral agreement. The hardship is not greater than that which exists in the case of many choses in action, of the assignment of which they who hold them in trust for others receive notice from the assignees; and as to the trouble of recollecting or registering attachment orders, the statute relieves the garnishee from that burthen, by providing, in the 68th section, that in the Master's office in each of the Superior Courts a debt-attachment-book shall be kept, in which attachments and proceedings thereon shall be entered, "with names, dates and statements of the amounts recovered," and copies of such entries may be taken by any person upon application to the Master. The effect upon the garnishee of an attachment order will, as it appears to me, mainly be to bind the debt in the hands of the garnishee (after service or notice of the order) to this extent, first, that he shall not pay it to his creditor, so long as the order remains in force; as

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M. T. 1858. appears both from the judgment of Lord Chief Justice Jervis in
Eschequer. *Hirsch v. Coates* and from the case of *Holmes v. Tutton* (a), which determined that the attachment order bound the debt as against the creditor of the garnishee, though it was to be deemed "a security for a debt," within the Bankrupt Act, and consequently within the section of that Act which displaced the security in favour of the assignees. Secondly, it would appear from *Turner v. Jones* (b), although it was not necessary to decide the point, that the garnishee cannot pay or settle with the attaching creditor, so as to discharge his own liability, without an order of the Court, as mentioned in the 67th section.

I must say, in conclusion, that if I had any doubt as to the effect of the attachment order, I would still be of opinion that we ought not to set it aside. It is essential for the security of the creditor, the present plaintiff, that it should remain, to be used as best it can, when the day of payment arrives. It cannot cause any substantial prejudice to the garnishee, who, when that time shall arrive, may show such cause as can then be opposed to a future conditional order for payment, under the 68rd section, without which he can never be compelled to pay to the present plaintiff any part of the debt; and whenever he chooses to relieve himself from the judgment, by paying the two debts or either of them, under the provisions of the collateral agreement, it will be competent to him to bring his own immediate creditor, the defendant in this action, before the Court, for the purpose of both being relieved from the attachment order. In the latter respect he is in no worse condition than my debtor against whom an attachment order has been pronounced, but against whom no order to pay has been yet made.

(a) 5 Ell. & Bl. 65.

(b) 1 Exch., N. S., 878.

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 22, 27.*

INFORMATION by the *Attorney-General*.—The first count charged that Robert Henley was concerned in unshipping, or otherwise dealing with, certain prohibited, restricted or uncustomed goods, to wit divers, that is to say, 960lbs. of foreign tea, contrary to s. 232 of the Customs Consolidation Act, 1853, whereby the said Robert Henley has forfeited the sum of £432, being treble the value of the said goods, for which the Commissioners of Customs have elected to sue.

Second count.—That the said Robert Henley was concerned in the illegal removal of certain goods; to wit divers, that is to say, 960lbs. of other foreign tea from a warehouse, or otherwise illegally dealing with the same after they had been so removed, contrary to the provisions of s. 232 of the Customs Consolidation Act, 1853, whereby, &c.

Third count.—That the said Robert Henley was knowingly concerned in evading duties of Customs upon, or in dealing with, certain goods; that is to say divers, to wit, 960lbs. of other foreign tea, with intent to defraud her Majesty of the duties of Customs in respect thereof, contrary to s. 232 of the Customs Consolidation Act, 1853, whereby, &c. The three counts literally followed the forms given in schedule B to the 16 & 17 Vic., c. 107.

Counts 16, 17 and 18.—To each of these counts a demurrer was taken on the part of the defendant, upon this general ground, applicable to all the counts, that it was not thereby alleged or shown with certainty, that the said Robert Henley did, or was concerned in doing, any act, matter or thing contrary to the 232nd or any other section of the Customs Consolidation Act, or for what dealing with goods, contrary to said section, he was to answer.

In informations for acts done contrary to the 16 & 17 Vic., c. 107 (the Customs Consolidation Act, 1853), counts following literally the forms given in schedule B to that Act are good.

These forms are applicable in proceedings before all Courts having jurisdiction, as well as in proceedings before Justices.

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W. M'Mechan, with *F. Macdonogh*, in support of the demurrer. At Common Law, these counts are clearly bad, for a charge cannot be laid in the alternative: *Bowen's case* (*a*). If they are to be sustained at all, it must be under the express words of the Customs Consolidation Act, 1853, 16 & 17 Vic., c. 107. It will be argued that the forms given by that Act are declared sufficient by s. 269; but that section, even if it sanctioned their use, only relates to proceedings before Magistrates. The Act is divided into parts, each part into sub-divisions; and there is a heading to each sub-division, which defines and limits the subject-matter of the sections contained in the particular sub-division. The sub-division which commences with s. 269 is headed, "As to proceedings "before Justices, for recovery of penalties and forfeitures and the "prosecution of offences." The section speaks of "conviction" and "condemnation," which apply to proceedings in Magistrate Courts; and the inference therefore is, that those forms were intended to be used only in those Courts. The 264th section does not furnish any argument for the Crown; because, although an endorsement is to be made on the back of the process, proceedings are, in the words of that section, to be "instituted in a Superior Court."

But further; it never was the intention of the Act that the pleader should adopt the literal words of the count. Take count sixteen, in which the words "unshipping or otherwise dealing with" occur: the word "or" there is only instructive to the pleader, and directory, and he must state the specific dealing with the goods of which he complains. The mistake, if any, is to be attributed to the mode of printing; for if these words had been in italics, there could be no doubt about the matter. The Court will presume that the defendant's construction is right, because the construction contended for by the Crown is at variance with the principles of the Common Law and the justice of the case. Count sixteen, if the argument for the Crown be right, would include every offence against the 232nd section. *The Attorney-General v. Ruck* (*b*) is an authority in point on the construction of this statute. General words in a statute, at the end of an enumeration, will not embrace any higher denomination than has been before

(a) 1 Den., C. C., 22.

(b) 11 Exch. 762.

specified : *Robinson v. Wynne* (a); and therefore the words "any Court having jurisdiction," in the 269th section, will include any Court having higher jurisdiction than that before specified in the section.

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Jebb and J. D. Fitzgerald, for the Crown.

We admit that these counts cannot be supported as good at Common Law ; but we submit that, as they follow the forms given in the schedule B to the 16 & 17 Vic., c. 107, they have been made valid by legislative declaration. The 269th section enacts that the counts given in the schedule shall be applicable to, and sufficient for, all purposes, and shall "be used in like manner in any "information filed in any Court having jurisdiction in such cases "under this or any Act relating to the Customs." To adopt the defendant's argument would be to blot the 269th section out of the statute. It is said that section is only applicable to proceedings before Justices : that argument answers one of the defendant's own arguments, founded upon the supposed injustice of the enactment, as it admits they are good in proceedings before Justices ; but the 269th section is not thus limited in its application.

For the purposes of convenient reference, the Act has been divided into parts, and part II has reference to legal proceedings. There are several headings to part II, the first of which embraces the sections 263-268 inclusive. Then comes another subdivision, sections 269-282, which is headed, no doubt, "Proceedings before Justices ;" but embraces and legislates for other matters of a cognate nature. If section 269 is restricted to proceedings before Justices, the Assistant-Barristers' Courts are excluded, and the Common Law mode of proceeding must be adopted there. Again, under the 264th section, it is in the power of the defendant to require, in certain cases, the proceedings to be carried on in the Superior Courts, and jurisdiction is conferred on such Courts by a simple indorsement on the back of the process issued. The inference is that this information is to be removed with the indorsement on it. Again, the 282nd section, which is within the sub-division headed "Proceedings before Justices," speaks of "all "penalties and forfeitures recovered under this or any other Act

M. T. 1858. "relating to the Customs," no matter in what Court recovered. We find, therefore, under this general heading, other matters of a cognate nature legislated for. The meaning of the 269th section is plainly this: having provided that the information before Justices may be in the form specified, it then for convenience adds parenthetically, that the same forms may be used in all cases. Another sub-division of part II embraces the sections 293-301, headed, "As to proceedings in the Superior Courts;" and in the 295th section we find "information" mentioned, and that is the information already described.

The 232nd section, under which we are proceeding, provides for four cases, and a count applicable to each is given: we have adopted three of those counts. There was an object in framing so general a count; viz., to prevent the necessity of proving technically the very offence charged; and the 211th and 305th sections impose the burden of proof on the defendant. In England, these counts are, as a matter of practice, in daily use. *The Attorney-General v. Ruck* (^(a)) has no application; the offence there charged was committed before the passing of the Customs Consolidation Act, and these counts could not have been used. It is said the word "or" in the words "or otherwise dealing with," is only directory to the pleader; but that is not so. The 18 & 19 Vic., c. 96, s. 34, enacts that, "The words 'otherwise dealing with certain prohibited, restricted or uncustomed goods,' in count sixteen of schedule B to 'the Customs Consolidation Act, 1853, shall be deemed to apply to and include the harbouring or having possession, as the case may be, of any such goods, and it shall not be necessary to prove that the party charged was concerned in the unshipping thereof.' This is a legislative declaration that the words of the count are to be literally followed. The pleadings are recognised and left unaltered; but there is a change made in the mode of proof, and an explanation given as to the evidence necessary to support the averment. The enactment would be useless, and no meaning could be given to the words "apply to and include," if it was not intended that those very words should be used.

(a) 11 Exch. 768.

F. Macdonagh, in reply.

The 34th section of the 18 & 19 Vic., c. 96, does not affect the defendant's argument. The object of that enactment was this: the 232nd section of the Customs Consolidation Act comprises five classes of offences: first, "being concerned in importing;" secondly, "the unshipping;" thirdly, "the knowingly harbouring;" fourthly, "the removal from a warehouse;" fifthly, "the knowingly evading duties." There is a count given in the schedule for every offence except the third class; and the object of the 34th section of the new Act was to supply that defect. For that reason, the section enacts that the words "otherwise dealing with" shall apply to and include the harbouring or having possession, and it shall not be necessary to prove that the party charged was concerned in the unshipping: the *scienter* must be still charged, but the harbouring or having possession is made *prima facie* proof of the guilty knowledge. An attempt may have been made before Magistrates, or at Quarter Sessions, to prove, under the allegation that a party otherwise dealt with certain goods, a knowingly harbouring of them, and an objection may have been taken that there was no count applicable to that offence, and that, at all events, the *scienter* should have been alleged. This section makes a twofold provision to meet that difficulty; it enacts that "otherwise dealing with" shall apply to the passive act of harbouring and keeping, and makes such harbouring *prima facie* proof of the guilty knowledge.

Cur. ad. vult.

The judgment of the Court was now delivered by—

Gazzola, B.

This was a demurrer to an information. The first count charges that the defendant was "concerned in unshipping, or otherwise dealing with, certain prohibited, restricted or uncustomed goods (specifying them), contrary to section 232 of the Customs Consolidation Act, 1853," and follows the terms of the sixteenth count in schedule B, annexed to that Act.

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The second count is for being "concerned in the illegal removal of certain goods (specifying them), from a warehouse, or otherwise illegally dealing with the same after they had been so removed,

M. T. 1858. "contrary to the provisions of section 232 of the Customs Con-
Eschequer. " lidation Act, 1853 ;" and this count follows the language used
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HENLEY. The third count is, that the defendant "was knowingly concerned
 "in evading duties of Customs upon, or dealing with, certain goods
 "(specifying them), with intent to defraud her Majesty of the duty
 "of Customs in respect thereof, contrary to section 232 of the same
 "Act ;" and the third count is in the terms of the eighteenth count
 in the schedule B.

To this information, a demurrer has been put in by the defendant ; and the question now is, whether these several counts or
 any one of them is, valid in point of law ?

The objection relied upon by the defendant is, that each of the counts is, according to the Common Law rules of pleading, clearly bad, as not charging the defendant with any specific offence; but only alleging, in the alternative, that he committed one or other of several distinct offences ; and that, being thus bad at Common Law, the indictment is not made good or sufficient by any legislative enactment.

It is not disputed, on the part of the Crown, that the rule of the Common Law is such as the defendant's Counsel allege ; but they contended that, assuming the rule to be so, and to be applicable to the case of such an information as the present, yet the Legislature has, by the 269th section of the Act (16 & 17 Vic., c. 107), expressly declared that counts in the form here adopted shall be sufficient in the respective cases to which they relate.

To this argument two answers have been given by the Counsel for the defendant ; first, that the 269th section applies solely to informations and proceedings before Justices of the Peace, and not to a Superior Court, such as the Court of Exchequer ; and secondly, that even supposing it to extend to Superior and all other Courts, yet the effect of it is not to validate an information merely following the alternative terms used in the schedule, but that it is still necessary, by selecting some one portion of the alternative, to charge a single offence ; that is, that the form used in the schedule cannot be literally followed even in the case of an information before Magistrates.

The 269th section is one of a series of enactments made for the purpose of regulating legal proceedings for the recovery of duties and penalties, and the enforcement of forfeitures imposed by the Act. The first of these enactments is section 263, which in the first instance provides that costs shall be mutually recoverable by and against the Crown, and then enacts that all duties, penalties and forfeitures under that or any other Act shall and may, with the exception afterwards stated, be sued for, prosecuted, determined and recovered by action of debt, information or other appropriate proceeding in the Superior Courts of Common Law at Westminster, Dublin or Edinburgh, or the Royal Courts in the Islands of Guernsey, Jersey, Alderney, Sark and Man, in the name of the Attorney-General or Lord Advocate, or of some officer of Customs or Excise. It then gives power to proceed by way of information in the name of some officer of Customs or Excise, for the recovery and enforcement of any penalty or forfeiture. It then enacts that in case of seizure of goods, the duties or penalties on which, claimed by the Crown, do not exceed £100, the Superior Courts shall not have jurisdiction, but the proceeding shall be before any one or more Justice or Justices, or in the County Court in England, or the Assistant-Barrister's Court in Ireland. It then enacts that those Inferior Courts may, if they think the case fit to be tried in a Superior Court, certify to the Treasury to that effect, and that the Treasury may then authorise the Commissioners of Customs to bring the case in the Superior Court, an indorsement of such order being made on the process to be issued from the Superior Court.

The 264th section gives the defendant in such case the right of having the matter determined in the Superior Court, upon a request delivered to the Customs officer or solicitor, a like indorsement to be made on the process from the Superior Court. By section 265, Justices may by consent exercise jurisdiction to a greater extent than £100. The 266th section substitutes a warrant from the Justices for a writ of *capias*, in certain cases. The 267th section authorises one information against several persons, although each may have incurred a different penalty. It is to be observed that

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M. T. 1858. jurisdiction is here conferred upon Justices only in cases of penalties and forfeitures, not where duties are to be recovered.

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We have then a preface before the 269th section, in these words:—"As to proceedings before Justices for recovery of penalties and forfeitures, and the prosecution of offences" (no mention of duties), after which preface it is enacted that all informations before Justices for any offence committed or forfeiture incurred, and all summonses, convictions and condemnations for such offences and forfeitures, and all warrants on such convictions, may be in the form or to the effect in schedule B, and that the form of information given in the schedule and the counts therein contained, with reference to any offences created by or punishable under the several sections of the Act, shall be applicable to, and sufficient for, all purposes in the prosecution of such offences and forfeitures. It then provides amongst other things, that every such information, &c., for such offence or forfeiture, shall be deemed valid, in which the offence or forfeiture is set forth, "either in the words of the Act or Acts by which the penalty for such offence has been inflicted, or under which any forfeiture has been incurred, or in the words of the information hereby prescribed."

So far, it may fairly be argued that the legislation is confined to proceedings before Magistrates. But then follow these general words:—"And the like counts shall be applicable to and sufficient for the like purposes, and be used in like manner in any information filed in any Court having jurisdiction in such cases, under this or any Act relating to the Customs."

Now what are such cases? Apparently cases of penalty and forfeiture, those only being the cases in which Magistrates have jurisdiction; and in that view the words "any Court having jurisdiction" would mean "any Court having jurisdiction conferred by the Act in cases of penalties or forfeitures."

The 270th section is expressly limited to proceedings before Justices, as also the sections 271, 272, 273, 274. Section 275, although not so clearly confined to Justices, is applicable to them, and the word "offence" being used, it is questionable whether it can apply, either according to that word, or to the nature of the thing.

to an action of debt for duties. Sections 276 to 282, both inclusive, apply to Magistrates only. There is then a heading before section 283, "As to the commitment and punishment of offenders after conviction, and the mitigation or increase of such punishment;" and then sections 283 to 289, both inclusive, relate to Magistrates only. Next comes a heading, "As to the removal of proceedings before Justices," after which sections 290 to section 292, both inclusive, refer only to Justices. Then follows a heading, "As to proceedings in the Superior Courts for penalties." Section 293 applies to the process; section 294 to the service of it; sections 295 to 300, both inclusive, seem to apply to Superior Courts only.

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The counts in this information are for penalties and not for duties. The Magistrates and the Superior Courts would therefore have concurrent jurisdiction. The first question then is, supposing that the counts would be sufficient before Magistrates, why are they not to be so in a Superior Court? There is no reason to be assigned why this degree of facility should be allowed to the Crown in one case rather than in the other. But besides this, how are the words "the like forms, &c., shall be sufficient in any Court having jurisdiction under this Act," in section 269, to be satisfied?

It is conceded in argument that they must apply to other jurisdictions than those of Justices; *e. g.*, Assistant-Barristers, County Court Judges, Royal Courts of Guernsey, &c., Governor, &c., of the Isle of Man. But it is argued that they do not include the Superior Courts at Westminster or Dublin. Are not these Courts, however, "Courts having jurisdiction in such cases (*i. e.*, for penalties) under this Act?" Is not jurisdiction expressly given to them in such cases by this Act? Has the Court of Queen's Bench or the Court of Common Pleas such jurisdiction otherwise than by this Act? If not, an information filed in either of these Courts for penalties must be good, if the same information would have been sufficient before Justices. If so, it would be a strong thing to hold that a pleading which would be good in the Court of Queen's Bench or the Court of Common Pleas would be bad in the Exchequer.

It is true that the title to schedule B is apparently applicable to proceedings before Justices; but this is not of any importance. The

M. T. 1858. early enacting part of the 269th section is no doubt referrible to such proceedings, and so is the schedule B connected with it; but then comes a distinct clause (just the same as a distinct section), viz. "What has been enacted with respect to Magistrates and the form before Magistrates" shall equally apply to any Court having jurisdiction under this Act. It is just the same as if the enactments had been again repeated and applied to the other Courts. The inference sought to be drawn from the heading of the schedule would go to show that County Courts and Assistant-Barristers' Courts are also excluded; and yet it is admitted that the forms must apply to those Courts. There seems, therefore, to be no reasonable ground for doubting that the Crown was not intended to be excluded, in proceedings in a Superior Court, from the benefit which it would have had if proceeded before the Justices.

But then comes the second question, viz., would this information have been sufficient even in an information before Justices? It is contended for the defendant that it would not; in other words, that it is not enough to copy the count in the schedule, but that where the word "or" occurs in the form, the information must still set out some one part of the alternative; and where the form uses general words, that is not enough to adopt such general words, but that the information must nevertheless be more specific in describing the offence.

The first observation which suggests itself upon this argument is that, if it be well founded, the forms or counts in the schedule are of little, if any, value. But it is to be observed that the Act of 1853 repeals and consolidates former Acts, one of which (8 & 9 Vic., c. 97, s. 103) enacted that informations (generally) in the words of the Act creating the offence should be sufficient. It would seem then that section 269 of the Act of 1853 was meant to repeat and extend that enactment, and that the intention of the Act of 1853 was, that the offence may be charged generally in the language of the Act, although in derogation of the ordinary and previous rule of pleading, which was, that it is not enough to follow merely the words of a statute.

The argument on behalf of the defendant was, that those forms

are merely what his Counsel termed "instructive" or "directory," that is, that they were merely suggestive to the pleader of the cast of his pleading, leaving him subject, however, to the necessity which existed at Common Law, of selecting one part of an alternative in such a case as the present; in other words, that those forms were intended merely to be as it were frame-work, to be filled in or completed, according to the known antecedent rules of pleading. It does not appear to us that this is so; there are indeed portions and particulars, with respect to which the form cannot be complete, and as to which therefore it is silent; as, for example, the parts in italics and between brackets, as, "here describe the goods." Here the form is in effect silent, so far as enactment goes; to this extent, and in this way only, is the form "instructive," or "directory" or "suggestive." It is so to this extent from necessity, and, I should say, from necessity only. The Legislature could not in this point guide the pleader, or furnish an exemplar; and therefore so much of the information must be in the language of the pleader himself. But what is attempted by the defendant's Counsel here is to insulate or separate, as it were, the other parts of the form, so as to give to them the same directory or instructive character, and to treat them as leaving to the pleader the risk and responsibility of following the rules of pleading, unaided by the legislative form. This is a liberty which we think ought not to be taken with the count in the schedule. We read the enactment as if it ran thus, "a count containing these words, and specifying the goods, shall be sufficient."

The case of *The Attorney-General v. Ruck* (a), cited for the defendant, rather makes against him. The form of the information in that case was "unshipping and otherwise dealing in;" and although several objections were made in arrest of judgment, none was raised to the indefinite or cumulative nature of the count. If any doubt could be entertained, as to the meaning of the forms in 16 & 17 Vic., c. 107, we think it would be removed by the 34th section of the 18 & 19 Vic., c. 96, which, referring to the counts in the former Act, enacts that the words (specifying certain words) in the count (not in the Act) shall be sustained by certain facts;

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(a) 11 Exch. 763.

M. T. 1858. showing most clearly that those words (*i. e.*, the vague general words now alleged to be merely instructive, or directory or suggestive) are part and parcel of the count, and to be used in

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It is not unimportant to observe the difference between the form of information in the schedule to 8 & 9 *Vic.*, c. 97, and that of the counts in the schedule to 16 & 17 *Vic.* In the former, no account is given as to the description of the offence, the form merely saying "here state the offence," whereas the latter gives words expressive of the offence. This was probably done for the purpose of making such expression or description sufficient.

Our opinion, as to the effect and operation of the Act, has been formed upon the language used in it and in the other Acts to which I have referred. We should, however, have hesitated to act upon it, had we found that it has not been the practice in England to file informations in the words of the schedule. It was suggested on behalf of the defendant, that it was to be inferred from the case *The Attorney-General v. Ruck* that such has not been the practice. It is satisfactory to us to find, from an answer given to inquiry made by my LORD CHIEF BARON as to the English practice, that there are numerous informations on the file of the Court of Exchequer in England, in the precise words of the 16th, 17th and 18th counts of the Act of 1853; so that the general understanding in England, of the effect of that Act, is in conformity with the view of it which we have taken.

We are therefore of opinion that this demurrer must be overruled and that judgment must be entered for the Crown.

RICHARDS, B.

In expressing my concurrence in the judgment, I have only to say, that I think we are all indebted to my Brother GREENE for the able judgment which he has just delivered.

E. T. 1858.
Common Pleas.

LITTLE and another *v.* WINGFIELD and others.

(*Common Pleas.*)

*April 26, 27.
May 4.*

THIS was an action for the disturbance of the plaintiffs in their several fishery.

The first count of the summons and plaint alleged that the defendants, on the 1st of May 1853, and at divers other days and times between that day and the commencement of the suit, broke and entered the several fishery of the plaintiffs in a certain river called the Moy; to wit, in that part thereof situate between the ford of the Castle of Belleek and the sea, at a place called Scurmore, situate in the barony of Tiveragh and county of Sligo, and fished in the said fishery for fish, &c.

The second count charged defendants with a like trespass to the plaintiffs' free fishery, assigning the same limits.

The third count described the trespass as having been committed in the plaintiffs' close at Scurmore, covered with water, and there fishing and killing fish. The defendant Wingfield pleaded, amongst other defences, pleas traversing the existence of the several, &c., fishery of the plaintiffs. He also pleaded to the first count, that the fishery on the said part of the said river was his several fishery; to the second count, a plea prescribing for a free fishery in that part of the river, as appurtenant to the lands of Scurmore, of which he was seised for an estate of freehold; and to the third count, a plea of soil and freehold in the *locus in quo*. The other

A several fishery in the River M., which had been granted by the Crown, anterior to the Statute of Magna Charta and had re-vested by forfeiture, was subsequently re-granted, in 1669, to Sir G. P., in fee-simple. A lease was afterwards made, in 1788, by the representatives of the grantee to a party through whom the plaintiffs claimed. The defendant having, at the trial of an action for disturbance of the plaintiffs' right, given evidence of the adverse user by him of a fishery within a portion of the fishery claimed by the owners of the original fishery to the defendant.

by the plaintiffs, opposite the lands of S., for a period of sixty years, and upwards:—*Held*, that it was evidence from which the jury were at liberty to presume a grant by the owners of the original fishery to the defendant.

As a link in the plaintiffs' title, an ancient deed, made subsequent to the grant of the Crown, was read in evidence, whereby A and B professed to grant the fishery to C; and containing an indorsement, without date, to the effect that possession had been given by one of the grantors in the presence of the witnesses. No question having been made as to the document being genuine:—*Held*, that the indorsement was evidence of the fact stated therein.

E. T. 1858. defendants, who pleaded separately, filed similar pleas. There were
Common Pleas. also other defences pleaded by all the defendants, to which it is not
necessary to advert. Issues were raised upon the several defences

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WINGFIELD. The case was tried at the last Sligo Spring Assizes, before Perrin, J., when the plaintiffs gave in evidence a number of ancient documents, commencing with an inquisition of the 22nd of September 1609, finding the fishery in the Moy to be the property of the Crown, and sundry letters patent, Crown rentals, deeds, &c., for the purpose of showing the existence, at the date of the inquisition, of a several fishery in the River Moy, within the limits specified in the summons and plaint, and its grant by the Crown to Lord Delvin, and its subsequent re-grant by letters patent, of 13 Car. 2, dated the 22nd of July 1661, and of 21 Car. 2, dated the 29th of May 1669, to Sir George Preston; and also in the purpose of showing the devolution of the title from the last to the Earl of Arran, under whom the plaintiffs claimed, as representing the interest of the lessee of a certain lease of the several fishery, dated the 25th of October 1788, by the Right Hon. James Cuffe, to Jones and Lindsay, at the rent of £250, in currency. The derivative title of the plaintiffs was admitted, for the purposes of the suit. Amongst other deeds given in evidence, was one bearing date the 17th of December 1675, between Viscount Granard and Lieutenant-Colonel William Hamilton, of the one part, and Sir Arthur Gore, of the other part; whereby, after reciting the said letters patent to Sir George Preston, and a certain grant of the 2nd of September 1673, from Sir George Preston to Viscount Granard and Lieutenant-Colonel W. Hamilton, the fishings in said River Moy, and the fishery of all the creeks and fishing places thereunto belonging, were conveyed as originally granted to Sir George Preston. The plaintiffs then offered an indorsement on the above deed, of the 17th of December 1675, as legal evidence that possession of said fishings in the River Moy were delivered as therein stated. Counsel for the defendants objected to this, as not being legal evidence of the fact; but the document was admitted by the learned Judge, and that was the ground of the first exception.

The plaintiffs, having completed their documentary evidence, to which it is not necessary further to advert, as, except so far as relates to the above exception, it was not involved in the present controversy, examined a large number of witnesses to prove that the plaintiffs and their predecessors had asserted their right of fishing in the River Moy, within the limits assigned, as far back as the memory of living witnesses went; but it appeared by the cross-examination of these witnesses, that, during the same period, the proprietors of Scurmore claimed to fish within certain limits opposite the mansion-house of Scurmore and elsewhere, and erected stakes in the river, and no active measures appeared to have been taken to prevent them.

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The case made on behalf of the defendants was, that Colonel Wingfield, the principal defendant, represented the grantee of a several fishery in that part of the river opposite Scurmore, who claimed either under the Crown, paramount to the grant to Sir George Preston, or under a sub-grant from Sir George Preston, or the other proprietors of the several fishery in the Moy, made prior to the lease of 1788. With that view the defendants read in evidence the documents referred to in the judgment of the **Lord Chief Justice.**

The defendant Colonel Wingfield, who was in possession of the lands of Scurmore since 1788, and other witnesses, also proved that during that period he had fished in the River Moy, opposite Scurmore, without interruption, and that he had prevented other parties, including the servants of those in privity with the plaintiff, from fishing in the same portion of the river.

The learned Judge then, in his charge to the jury, told them that, in his opinion, after the grant by the Crown to Sir George Preston, assuming that it included the fishing places claimed by the plaintiffs, which was a question for the jury, nothing further by way of reservation remained in the Crown to grant; that he was of opinion that the plaintiffs had shown a title to a several fishery; that if Scurmore was one of the fishing places included in the grant, with respect to the title of Colonel Wingfield, there was nothing to warrant the jury in finding that he had a title to a

E. T. 1858. *several fishery in Scurmore*; and that in case they should find ^{Common Places.} that was one of the fishing places in Sir G. Preston's patent, *they* should find, for the plaintiffs, in the affirmative of all the issues.

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Counsel for defendants excepted to this charge, and called on the Judge to tell the jury that, if they believed that the right of fishing had been uninterruptedly, continuously and adversely exercised by the defendant Colonel Wingfield, and those deriving under him, for above twenty years before the commencement of this suit, and as far back as the memory of the witnesses examined in the case extended, as stated by them in their evidence, the jury in such case, might *presume* a grant of such fishery as was so exercised from the Crown, or from some person having power and right to make such grant; but his Lordship refused so to direct the jury, and held that there was no sufficient evidence given in this case to warrant him in giving such direction to the jury. The above is the second exception.

The subject of the third exception was the refusal of the Judge to tell the jury that the evidence given in this case, if they believed it, was evidence of such right of several fishery as claimed by defendants.

They fourthly excepted to the refusal of the Judge to tell the jury that the terms of the adjudication of the Court of Claims and of the patents so given in evidence, were consistent with the right of fishery at Scurmore, claimed by the defendant Colonel Wingfield, under the grant to Lewis Wingfield, so given in evidence. The jury found for the plaintiffs on all the issues.

Carleton and *Fitzgibbon* were heard in support of the exception. *Beytagh* and *Brewster*, contra, in support of the verdict.

The following cases were cited: *Duke of Devonshire v. Holness* (a); *Holford v. Bailey* (b); *Hayes v. Bridges* (c); *Attorney General v. Ewelme Hospital* (d); *Goodtitle v. Baldwin* (e); *Lind*

(a) 1 H. & Bro. 322.

(b) 8 Q. B. 1000; S. C., in error, 13 Q. B. 426.

(c) Irish T. R. 395.

(d) 17 Beav. 386.

(e) 11 East, 488.

v. Wilson (a); Doe v. Cooke (b); Blewitt v. Tregonning (c); D. of E. T. 1858.
 Somerset v. Fogwell (d); Gabbett v. Clancy (e); Mayor of Exeter ^{Common Pleas.}
 v. Warren (f); Mayor of Hull v. Horner (g); Doe v. Millett (h);
 Mayor of London v. Hastings (i); Bann Case (k); Co. Lit., WINGFIELD.
 122, a, b; Hargreave's Note, 7; 2 Bl. Com., pp. 87, 89; Trials
 per Pais, p. 287; D. of Beaufort v. Swansea (l).
Cur. ad. vult.

MONAHAN, C. J.

This case comes before the Court on exceptions taken at a trial before Judge Perrin. May 4.

The plaintiffs are Maryanne Little and Andrew Clarke, who complain, in the first paragraph of their summons and plaint, that the defendants, the Hon. Edward Wingfield, and three other persons, on the 1st of May 1853, and divers other days, broke and entered the several fishery of the plaintiffs, at Scurmore, on the River Moy, and took fish there. The second count or paragraph is similar to the first, with the exception that it calls the fishery the free fishery of the plaintiffs. In the third paragraph the trespasses are stated to have been committed in a close of the plaintiffs, covered with water. The defence of the defendants is in substance that the fisheries in question are not the fisheries of the plaintiffs, but are the fisheries of the defendant Edward Wingfield, and that the other defendants committed the alleged trespasses as his servants, by his direction. On those pleadings there were several issues, either settled by a Judge or agreed upon by the parties, but it is unnecessary to refer to more than the first and fourth; the first being whether, on the 1st of May 1853, the plaintiffs had a several fishery in that part of the River Moy between the ford at the castle of Belleek and the sea, at the place called Scurmore, as alleged? The fourth issue is whether the fishery in the first paragraph of the summons and plaint mentioned was, at the time

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| (a) 3 Bing. 115. | (b) 6 Bing. 180. |
| (c) 3 Ad. & Ell. 554. | (d) 5 B. & C. 875. |
| (e) 8 Ir. Law Rep. 299. | (f) 5 Q. B. 773. |
| (g) Cow. 108. | (h) 11 Q. B. 1036. |
| (i) 2 Sid. 8. | (k) Dav. 157. |
| (l) 3 Ex. R. 413. | |

E. T. 1858. of the committing of the alleged trespasses, the fishery of the
Common Pleas. defendant Edward Wingfield?

LITTLE v. WINGFIELD. The plaintiffs, in support of their case, produced a vast quantity of documentary evidence, and, amongst others, an inquisition of the 9th of James the First, 22nd September 1609, by which it was found that the Crown was then seised in fee-simple of the several fishery in the River Moy, from the bridge of Ballina down to the sea. They also gave in evidence letters patent of the 9th of James the First, 26th June 1609, whereby the said several fishery was granted to Lord Delvin. It appears that the fishery in some time after was again vested in the Crown; for by letters patent of the 21st Charles the Second, the same fishery was granted in fee-simple to Sir George Preston, his heirs and assigns. The plaintiffs also deduced title to the several fishery in question, from Sir George Preston, the patentee, to the Right Honorable James Cuffe, and he proved a lease for 200 years, dated the 25th of October 1788, from the said Right Honorable James Cuffe, to Messrs. Jackson and Lindsay, at a rent of about £250 per year. At the trial, it was admitted by the defendants' Counsel, that the term and interest of the lessees under this lease were now vested in the plaintiffs. During the argument before us, some question arose as to the effect of this admission. We entertain no doubt as to the meaning of the admission, and the intention of the parties was simply this; that the case should be tried precisely as if the lessees in the lease of 1788 were the plaintiffs in the present action, or as if a regular conveyance from them to the plaintiffs was duly proved—there being no dispute as to the fact that the plaintiffs had vested in them the title of the lessees in that lease. Among the other documentary evidence produced by the plaintiffs was a deed of the 17th of December 1675, between Viscount Granard and Lieutenant-Colonel William Hamilton, of the one part, and Sir Arthur Gore, of the other part; whereby, after reciting certain conveyances of the fisheries in question to the said Viscount Granard and Lieutenant-Colonel Hamilton, they conveyed same to the said Sir Arthur Gore. No objection was made to the admissibility of this deed in evidence, but it

tiffs offered in evidence an indorsement thereon, to the effect that possession of the within mentioned fisheries was given to the said Sir Arthur Gore, in the presence of the persons whose names were subscribed thereto as witnesses, but which indorsement was without date. Defendants' Counsel objected to the reception of said indorsement as evidence that possession of said fishery was delivered as therein stated. The learned Judge, however, received the evidence, and such reception is the subject of the defendants' first exception. On the argument of this exception before us, it was objected by defendants' Counsel that, for anything that appeared in evidence, this indorsement might have been put on the deed of 1675 at a very recent period, and that no evidence was given of its having been on the deed at any antecedent period; the answer to which is, no such objection was made at the trial. It was assumed that the indorsement was genuine, the only question being as to its admissibility. Assuming its genuineness, it might as well have been objected that the deed itself might have been a fabrication. Old charters of feoffment generally contained indorsements of livery of seisin having been made, and I am not aware that any doubt ever existed as to their admissibility in evidence. We entertain no doubt that the evidence was properly received, and therefore the first exception must be overruled.

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In addition to the documentary evidence to which I have referred, the plaintiffs gave a considerable body of parol evidence, the result of which was, that as far back as the memory of very old witnesses could extend, the parties entitled under the lease of October 1788 enjoyed what, uncontradicted and unexplained, would appear to have been a several fishery in the River Moy, from the ford or bridge of Belleek to the sea; and it also appeared that the plaintiffs regularly paid to Lord Arran the rent of £250 a-year, reserved by said lease. On the direct evidence of some of the plaintiffs' witnesses, and cross-examination of others, however, it appeared that, as far back as their memory could reach, the defendant Colonel Wingfield, and his tenants of the lands of Scurmore, fished in that part of the

E. T. 1858. river adjoining the lands of Scurmore. One of plaintiffs' witness
Common Pleas. Owen M'Nulty, who had been, for several years, one of plaintiffs' fishermen, stated that he fished below Colonel Wingfield's fishery; but that he did not fish at that particular point, it being too rocky. Another of plaintiffs' witnesses, Samuel Gray, who was for several years, one of the watchmen employed by the plaintiffs to protect their fishery, was aware of the fishing carried on by Colonel Wingfield's people; had no authority or directions to interfere with them, and did not do so. Such was the plaintiffs' case. The record before the Court does not state what case was stated or relied on by the Counsel for the defendants; but they gave a quantity of parol evidence, the result of which may be stated to be that, during the last sixty years, as far back as any of the witnesses could recollect, the defendant Colonel Wingfield and his tenants deriving under him, fished for salmon in that part of the river adjoining the lands of Scurmore; that they did so openly, that nobody interfered with them, or attempted to prevent them; that nobody else fished in that part of the river; that the fishing was valuable, and let at a separate rent by Colonel Wingfield; that on one occasion Mr. Little's men were about fishing there, but ran away when they saw the Colonel coming across the strand to turn them off.

The defendants examined one important witness, Patrick Barron, who stated that he had been a fisherman in the employment of the Littles; that he used to fish further down the river, but that he had express directions from them not to fish in or meddle with Colonel Wingfield's fishery. Defendants also gave some documentary evidence, including an adjudication of the Court of Claims in favor of Lewis Wingfield, the ancestor of the defendant Colonel Wingfield, dated the 28th of December 1668; and letters patent, dated the 29th of June 1670, whereby several denominations of land, and amongst others, the lands of Scurmore, were granted to the said Lewis Wingfield, his heirs and assigns for ever, together with all ways, water-courses, fishings, rights, members and appurtenances thereto belonging. At the close of the evidence on both sides I suppose the learned Counsel for defendants and plaintiffs addressed

the jury, but we have no means of knowing on what grounds E. T. 1858.
defendants' Counsel rested their alleged rights; but from what has CommonPleas.
been stated at the Bar, and from the Judge's charge appearing on
the record, we think it very probable that the defendants' Counsel LITTLE
mainly relied on the patent of 1670, as granting a right of fishing,
and they of course relied on the parol evidence as showing posses-
sion in the defendants. The charge of the learned Judge is given at
some length; and he informed the jury that the patent to Sir George
Preston granted to him a several fishery in the entire river from
the bridge of Belleek to the sea, and in all the fishing places thereof;
that the patent to Wingfield could not grant a several fishery, same
not being capable of being appurtenant to land; more particularly as
the Crown had previously granted the several fishery in the entire
river, without any exception, to Sir George Preston; and that the
only question in fact was whether the fishing place in question
was one of the fishing places of the River Moy; that if so, the
right was vested in the plaintiffs; and that there were no grounds
for presuming any grant from the Crown to the defendant or his
ancestors, and therefore that they should find a verdict on all the
issues for the plaintiff, if they were of opinion that the place
in question was one of the fishery places of the River Moy. To
this direction of the learned Judge the Counsel for the defendants
excepted, and required him to inform the jury that if they believed
the right of fishing had been uninterruptedly, continuously and
adversely exercised by the defendant Colonel Wingfield, and those
deriving under him, for above twenty years before the commencement
of this suit, and as far back as the memory of the witnesses examined
in the case extended, as stated by them in their evidence, the jury, in
such case, might presume a grant of such fishery as was so exercised
from the Crown, or from some person having power and right
to make such grant. The meaning of this exception appears to
be, if the jury came to the conclusion that, so far back as the
witnesses could recollect, say sixty years, the defendant Colonel
Wingfield enjoyed an exclusive right of fishing in the place in
question, they were at liberty, not obliged, to presume a grant
of a several fishery in the place in question from the Crown,

E. T. 1858. or if not from the Crown, from some persons having power in
Common Pleas. right to make such grant; that is, from Sir George Preston, the
LITTLE patentee, or some persons claiming under him prior to the execu-
v. tion of the lease of October 1788, or from the lessors in that lease,
WINGFIELD. some persons deriving under them since the execution thereof.
And I confess that, having given all the attention in my power to the arguments of the learned Counsel for the plaintiffs, I am at a loss to discover any legal principle or authority which shall prevent such evidence being submitted to the jury, from which they might presume a grant. It would be a useless waste of time to cite those cases establishing that long user of an incorporeal right is evidence from which a jury may presume a grant, viz. the right is such as may be created by grant; as the well-known case where the enjoyment of common of pasture in the lord's waste for forty or fifty years, is evidence from which the jury may presume a grant, though within a short time previously the tenant's land was in the possession of the lord, and thereby the prescriptive right, if any existed, extinguished. The general rule has not been questioned by Mr. Brewster, the able Counsel for the plaintiffs, but he insists that, inasmuch as a several fishery in a public navigable river is a thing against common right, no length of possession can be evidence of title, and, in the absence of sufficient proof of title in the defendants to the several fishery in question, no length of possession can avail. This may be so in a case in which such a right is claimed, without any evidence of its legal creation or existence; but in the present case the patent to Sir George Preston, and the previous inquisition, show clearly, that a several fishery in the entire of the river, from the ford to the sea, was vested in him in fee-simple. No one doubts that this was a hereditament capable of being assigned or devised in whole or in part; that it was competent for the patentee to grant the several fishery in a portion of the river, namely, that now in dispute, at Scurmore, to Lewis Wingfield in fee-simple, retaining to himself his several fishery in the residue of the river; or that he might grant the right of taking fish (not an exclusive one) in a portion of the river, and thereby create a free fishery. And, as I

have already stated, I am at a loss to discover any grounds why, as between parties so situated, long enjoyment should not be held as some evidence of such a grant. With respect to those cases to which we have been referred on the subject of presumed surrenders of outstanding terms, we do not think they have any application to a case like the present; they proceed on a principle altogether different.

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We therefore are of opinion, in the present case, that the jury should have been told that, if they found the possession of Colonel Wingfield was such as stated in the exceptions, that was evidence from which they might presume a grant from some person having power and right to make the same; and, therefore, we will allow this second exception to the charge.

The third exception varies from the second, by calling on the Judge to inform the jury that the evidence given, if believed, was evidence of the right of several fishery. This, as we understand it, was calling for a direction in favour of the defendants: this we do not think the defendants were entitled to. We do not think the jury should have been directed to find the existence of the right or of the execution of the conveyance; but that a question as to the existence of the grant should have been left to them. We, therefore, overrule this exception.

The fourth and last exception to the charge is, that the learned Judge should have informed the jury that the terms of the adjudication of the Court of Claims, and of the patents so given in evidence (I suppose by both parties), are consistent with the right of fishing at Scurmore, as claimed by the defendant Colonel Wingfield, under the grant to Lewis Wingfield, so given in evidence. We are unable to discover what exactly the point of this exception is; we have not been able to understand it; and, therefore, we think the proper rule will be to set it aside. The result of our opinions, therefore, will be, to overrule the first and third exceptions; to allow the second, and set aside the fourth, and, of course, award *a venire de novo*.

Judgment for defendants.

T. T. 1858.
Queen's Bench

THE COUNTESS OF LISTOWEL

v.

ROBERT E. GIBBINGS.

April 19.
May 31.
June 3, 4, 7.

(Queen's Bench.)

Upon the trial of an issue at Nisi Prius, it is the duty of the Judge to permit Counsel to proceed with his statement of the matters which he proposes to give in evidence, in order that the Court above may have before it both the evidence proposed to be tendered, and also the ruling of the Judge thereon.

LIBEL.—Defence; that the publication was not a libel in thereon. Upon the trial, before Greene, B., at Cork, at the Spring Assizes 1858, *R. J. Lane*, in his opening speech for the defendant, was proceeding to state matters which, he avowed, would go to negative malice in the defendant, and to mitigate the damages; but not, by way of justification, to prove the truth of the statements contained in the libel. The plaintiff's Counsel having objected, the learned Judge thereupon refused to allow the Counsel for the defendant to proceed with his statement of these matters, and a verdict was found for the plaintiff.

R. J. Lane having, on a day this Term, obtained a conditional order for a new trial—

April 19.

Serjeant *Deasy* (with him *Copinger*, *J. Clarke* and *E. Sullivan*) now showed cause.

R. J. Lane (with him *W. Brereton* and *J. Greene*), in support of the conditional order.

The points argued were, first, whether the Counsel for the defendant ought to have been allowed to proceed with his statement. Secondly, whether the matters proposed to be stated by him were properly receivable in evidence under the plea of no libel?

Cur. ad. coll.

June 7.

Lefroy, C. J.

In all the cases in which the question which has been argu-

before us has been discussed, it has been discussed upon the statement of the matters which the defendant proposed to give in evidence in mitigation of damages. In the present case, therefore, the Counsel for the defendant ought to have been permitted to state the matters which he proposed to prove, in order that this Court might now have before it those particular matters, and the ruling which was made at the time by the learned Judge who tried the cause; it is otherwise impossible for this Court to exercise a discretion as to that ruling. The case must, therefore, go for a new trial, upon this narrow ground, that the learned Judge ought not to have stopped the defendant's Counsel in his statement of the matters which he proposed to prove.

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Order absolute.

BEAUMAN v. KINSELLA.*

June 7, 8.

THE plaint complained, in the first count, that the defendant broke ^{Trespass, for fishing in a} and entered the plaintiff's close covered with water, situate in the ^{several fishery.}

By letters

patent of the 14th Charles the First, several denominations of land abutting on the north bank of the Owen Gorman River were granted to M. (through whom the defendant claimed), his heirs and assigns; "and also the half of all fisheries, and taking of salmon and all other kind of fish in the River of Owen Gorman, near said lands, from the lands of C. to the lands of M." (which included the spot where the fishing complained of took place); "and also all fisheries of salmon, herrings and all other kinds of fish in the seaport or creek there, in or near the said town or lands, or any part thereof." Certain other lands abutting on the south side of the said river were, at different times, conveyed to the plaintiff's ancestor. The plaintiff proved that he had exclusively fished in the Owen Gorman River, with nets, for upwards of forty years, without interruption; but it also appeared that, prior to that time, the persons claiming under the patent of Charles the First had exercised a right to fish with nets on the north bank of the river, and that their tenants had since that time uninterruptedly fished there with rods.—*Held*, that as the documents by which the parties respectively deduced their title established the existence of a tenancy in common in the fishery, the plaintiff could not, by any length of user or enjoyment, obtain an exclusive right of fishery in the river, to the exclusion of his co-tenant in common, nor would a grant of such exclusive fishery be presumed.

The mere non-user by one tenant in common, of that which belongs to both him and his co-tenant in common, cannot raise the presumption of a grant.

Sembly.—Acts by one tenant in common, which entirely destroy or put an end to the enjoyment of the property in common, may amount to an ouster by such tenant in common of his co-tenant in common.

* PERRIN, J., *absente*.

T. T. 1858. parish of Killgorman, in the county of Wexford, and fish therein; and in the second and third counts, that the defendant broke and entered the plaintiff's fishery in the Killgorman River described in the same counts respectively as a several fishery or a free fishery; and in the fourth count, that the defendant broke and entered a certain other several fishery of the plaintiff, in a part of the Killgorman River flowing over the soil of the estate of Sir T. and Lady Esmonde, in right of Lady Esmonde, and adjacent to the lands of Sir T. and Lady Esmonde, and fished therein.

The plaintiff then averred title in the plaintiff, from time immemorial, to an exclusive right of fishing in that part of the said river which flowed over the soil of the estate of Sir T. and Lady Esmonde, in right of Lady Esmonde, and adjacent to the lands of Sir T. and Lady Esmonde, in right of Lady Esmonde, and that the defendant wrongfully fished in the last-mentioned fishery.

The defendant, to the first count of the plaintiff, pleaded a traverse of the plaintiff's title to the close in question, and also averred that Sir T. and Lady Esmonde, in right of Lady Esmonde, and their whose estate they then had, from time immemorial, had a several fishery in the same close; and that, by their authority, and as their servant, the defendant had entered and fished therein.

The defendant also traversed the remaining counts in the plaint, and, by way of further defence thereto, pleaded, that the *locus in quo*, where the alleged trespass was committed, was an arm of the sea where the tide ebbed and flowed, and where any subject of the realm had a right of fishing; and that the defendant, being a liege subject of the realm, fished therein at seasonable times for fishing; and by way of further defence, averred seisin of the land adjoining the places in the plaint mentioned, by Sir T. and Lady Esmonde, in right of Lady Esmonde; and that they and all their whose estate they had, from time immemorial, had for themselves their tenants and servants, common of fishery in the *locus in quo*; and that the defendant, by the authority, and as the servant of Sir T. and Lady Esmonde, entered and fished therein at seasonable times of the year.

Upon the trial, before Keogh, J., at Wicklow, at the Spring Assizes 1858, it appeared that the place where the trespass con-

plained of occurred was the Owen Gorman River, in the county of T. T. 1858.
 Wexford. That the lands on the north side of the river were, for a Queen's Bench
 considerable portion of the course of the river, the property of Lady BEAUMAN
 Esmonde, who derived title to them through the Grogan family; q.
 and that part of the lands on the south side of the river were the KINSELLA.
 property of the plaintiff.*

The plaintiff gave in evidence indentures of lease and release, dated the 28th and 29th of November 1771, and executed upon the occasion of a sale pursuant to a decree of the Equity Exchequer, by which, together with several other townlands, the townland of Ahare, abutting on the Owen Gorman River, was conveyed to John Beauman, his heirs and assigns, "with all mines, minerals, fisheries, wrecks, &c., rights, liberties, franchises, royalties, perquisites, woods, &c., waters, watercourses, &c., easements, emoluments and advantages whatsoever to the said lands and premises belonging or appertaining." It also appeared that the alleged trespass was committed by the defendant (an undertenant upon the property of Sir T. and Lady Esmonde), by fishing with a net in the river, nearer to the north than the south bank, between the townland of Clones, which was part of the property of Sir T. and Lady Esmonde, and the townland of Ahare, which was the property of the plaintiff. Upon the part of the plaintiff, several water-bailiffs appointed by him were examined, and proved their warrants of appointment, and the plaintiff's orders to them

* The following plan shows the relative position of the lands.

ESTATES OF SIR THOMAS AND LADY ESMONDE.				
Castletown.	Ballyreade.	Clones.	Sea.	
Castletown bridge.				* <i>Locus in quo.</i> Kilgorman or Owen Gorman River.
Baroge Lands of W. Wybrant.	Clondarragh.	Ahare. Plaintiff's lands.	Kilgorman glebe lands.	Sea.

⁸ The northern portion of the lands did not altogether encompass the 200 acres mentioned in the letters patent, the boundaries, however, were identified so that it was admitted by the defendant that Moneylegagh, the limit of the acre granted by this patent, was nearer to the source of the river than Cedar Hilltop, comprising the Brigid's Cross estate, and situated on the 200

of the river ; and "also one half of the fishery and taking of salmon
"and all other kinds of fish in the River Owen Gorman, from the
"lands of Moneyleygagh to Ballymacdemodroe ;" * and the plaintiff,
pursuant to notice by the defendant, produced indentures of lease
and release, dated the 16th and 17th of December 1808, by which,
after reciting the last mentioned letters patent, the lands and fishery
thereby granted to W. Plunkett were conveyed to J. C. Beauman,
the plaintiff's father.

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The defendant also gave in evidence a lease, dated the 18th of February 1806, by which the house and lands of Castletown, which was one of the denominations of land granted by the letters patent to H. Masterson, were demised by J. Knox Grogan to E. R. Rowe junior, for the life of E. R. Rowe senior.

It was also proved on the part of the defendant, that members of the Grogan family, while residing at Castletown, had fished the river with nets upon the north side from 1790 to 1798, and that E. R. Rowe had also fished it in a similar manner while residing at Castletown. That none of the family of E. R. Rowe had resided at Castletown for upwards of the last thirty-five years. That the tenants of the Grogan family fished with rods in the *locus in quo*, without interruption.

The defendant's case having closed, Counsel on his behalf called upon the learned Judge to direct a verdict for the defendant, but the learned Judge refused so to do. Counsel for the defendant then called upon the learned Judge to tell the jury that, the title under Masterson's patent being shown, they could not under any circumstances presume a grant in favour of the plaintiff, even though they should be of opinion, upon the evidence, that there had been an exercise for more than twenty years of an exclusive right to the fishery by the Beauman family ; but the learned Judge refused so to do, and left the case to the jury upon the evidence, telling them, that a several fishery involved the exclusion of all others from the right of fishing ; but that if they believed that the plaintiff, and those

* Ballymacdemodroe could not be identified, but was admitted to be nearer to the source of the river than Moneyleygagh, which was the limit of the fishery granted by Masterson's patent.

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through whom he derived, had uninterruptedly exercised an exclusive right to the fishery in question for more than twenty years, and it was done so to the exclusion of all others, they might presume a grant of the fishery to him or to one of his predecessors; and that they might do this, even though at one time the Grogan family had a right to one half of the fishery; and that the fishing of the Grogans, tenants with rods, if the jury believed it was done by the permission of the Beauman family, would not destroy the presumption. The jury found for the plaintiff.

Rollestone, on the 16th of April, having obtained a condition order to set aside the verdict for the plaintiff, for misdirection, as also that a nonsuit, or a verdict for the defendant, should be entered pursuant to the leave reserved; or for a new trial, on the ground of misdirection, and the reception of illegal evidence, and, that the verdict was against evidence, and the weight of evidence—

J. A. Wall (with him *D. Lynch* and *W. Ryan*) now showed cause. Notwithstanding that the letters patent of the 14 Car. I granted the one-half of the fishery to parties other than those through whom the plaintiff claims, the evidence establishes the plaintiff's title to the exclusive fishing of this river: *Co. Lut.*, 122 a. The jury were at liberty to presume a grant of such an exclusive right: *Mays of Kingston v. Horner* (a); especially as against those in whose right the defendant justifies the trespass, because they had power to make such a grant to the ancestors of the plaintiff. The law as to presumptions of this kind is well settled: *Read v. Brookman* (b). In *Beale v. Shaw* (c), Lord Ellenborough, C. J., says:—"I take it, that twenty years' exclusive enjoyment of the water in my particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." See also *Pickering v. Lord Stamford* (d); *Doe d. Fenwick v. Read* (e). In *Eldridge v. Knott* (f), Lord Mansfield, C. J., says:—

(a) Cowp. 102.

(b) 3 T. R. 151.

(c) 6 East, 208, 215.

(d) 2 Ves. jun. 280, 58.

(e) 5 R. & Ald. 232.

(f) Cowp. 214, 215.

"There are many cases not within the statute, where from a principle of quieting possession the Court has thought that a jury should presume anything to support a length of possession." See *Keymer v. Summers* (a); *Keene v. Deardon* (b). In *Gray v. Bond* (c), where the parties had publicly landed their nets for more than twenty years on a certain part of the shore, it was held that the jury were rightly directed to presume a grant. See the cases collected, 2 *Stark. Ev.*, p. 904, 3rd ed.

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Brewster (with him *Rollestone* and *J. E. Walsh*), contra.

The plaintiff has proved no title to a fishery in the tidal part of this river prior to Magna Charta. As to the inland part of the river, the grant of the lands abutting on the river, by the letters patent of the 14 Car. 1, passes also half the soil of the bed of the river adjoining these lands, and with it the right of fishing in that half of the river; but even independently of that, the letters patent expressly grant half the fishery; and the evidence, consistently with this, proves a tenancy in common of the fishery. The omission by the Grogan family to exercise their right, after they ceased to reside at Castletown, does not raise a presumption of an abandonment of that right: *M'Donnell v. M'Kinty* (d). The Esmonde title was proved distinctly; no presumption, therefore, can be made against it; besides, the plaintiff does not rest his case upon a supposed grant: *Hendy v. Stephenson* (e); *Blewett v. Tregonning* (f); *Bright v. Walker* (g). The question for the jury is, was there an actual grant? *Livett v. Wilson* (h). In *The Attorney-General v. Ewelme Hospital* (i), the Master of the Rolls, at p. 390, lays down the principle which governs such cases. In *Doe d. Hammond v. Cooke* (k), Tindal, C. J., p. 179, says:—"No case can be put in which any presumption has been made, except where a title has

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|---|---------------------------------|
| (a) <i>Bull.</i> , N. P., 74 b. | (b) 8 <i>East</i> , 248, 266. |
| (c) 2 <i>Br. & B.</i> 667; <i>S. C.</i> 5 <i>Moo.</i> 527. | (d) 10 <i>Ir. Law Rep.</i> 514. |
| (e) 10 <i>East</i> , 55. | (f) 3 <i>Ad. & El.</i> 554. |
| (g) 1 <i>Cr., M. & R.</i> 222. | (h) 3 <i>Bing.</i> 115. |
| (i) 17 <i>Beav.</i> 366; <i>S. C.</i> , 22 <i>L. J.</i> , Ch., 846. | |
| (k) 6 <i>Bing.</i> 174. | |

T. T. 1858. "been shown by the party who calls for the presumption good
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 KINSELLA. "substance, but wanting some collateral matter necessary to make
 "complete in point of form." Here, the plaintiff should have shown
 that his possession was inconsistent with the true title when it
 was shown: *Gray v. Bond* (*a*). The authorities are collected in
Taylor on Ev., p. 129, 2nd ed. A tenancy in common in the whole
 river is established here, and therefore the fishing by one tenant
 common cannot deprive his co-tenant in common of his right. The
 case is similar to the receipt of rent by one tenant in common: *C. Litt.* 243 *b*. Sir T. and Lady Esmonde are shown to be entitled
 either to a right of fishing in half the river, or to a tenancy
 common of the whole river; and in either view the plaintiff must
 fail in this action.

D. Lynch, in reply, cited 2 *Wms. Sewell*, pp. 174 a, 183;
Holcroft v. Heel (*b*).

LEPROY, C. J.

June 8.

The well-known principles of the Common Law will enable us to dispose of this case, without an investigation of the vast variety of authorities which have been referred to in the course of the argument. This is an action brought by the owner of lands on one side of a fresh water inland river, against the owner of lands on the other side of the same river. Now, what is the legal consequence arising from the fact that these lands are thus circumstanced, and that the owners on either bank are entitled to the land thus abutting upon the same river? It is this: each party is entitled to the soil of the river up to the middle of the stream, *usque ad medium filum aquæ*; and is, therefore, entitled also, as a matter of right, to the fishing therein—not as an easement *in alieno solo*, but as a right of fishery in the party's own land; and, inasmuch as the river is not divided by any abutments marking the respective rights of the parties, and as the fish run freely from one side to the other, this right of fishery is, in its very nature, a species of tenancy in common. This then being the pos-

(*a*) 5 Moo. 527; S. C., 2 Br. & B. 667.

(*b*) 1 Bos. & P. 400.

tion of the parties, we have evidence of record, with respect to the defendant, that, in the reign of Charles the First, the lands on the defendant's bank of the river were granted by letters patent to Henry Masterson, through whom the defendant claims; and, of course, that grant also comprised the land *usque ad medium filum aquæ*, together with the right of fishery therein. But although the right of fishery would, in such a grant, pass by implication, yet these letters patent expressly, and in terms, give this right to the grantee. What then does that grant give to a party, as against the proprietor of the opposite bank of the river, and the right of fishery incident thereto? Does it not give him a clear right either to a fishery in one-half of the river, or to a moiety of the fishery in the whole of the river? But what is the plaintiff's claim here, which, if he does not establish, his case fails altogether? It is not a claim to a tenancy in common in the fishery, nor to a right of fishery half way over the river, but it is a claim to the exclusive right of fishery in the whole river. Now, as I have already said, if he do not establish that, he cannot succeed in this action.

It is admitted, that the whole of the lands granted by the letters patent of Charles the First belong to Sir T. and Lady Easonde, at the present time, and, of course, the moiety of the soil which extends to the middle of the river must also belong to them. Is there not then a tenancy in common, of one kind or another, between the parties? But, see what would be the result as to this tenancy in common, were the law such as it was stated by the learned Judge, in leaving the case to the jury. In my opinion, he was wrong in telling the jury, in his charge, that an exclusive right of fishery might be presumed from the mere fact of the plaintiff's possession, or enjoyment and use of the whole fishery, by spreading his nets across the river from one side to the other; for if there was a tenancy in common in the fishery across the whole of the river, each of the tenants in common had a right to do what the plaintiff has done here. If, indeed, one of the tenants in common had erected abutments in the middle of the river, or by any other act had entirely destroyed and put an end to the enjoyment

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T. T. 1858. in common, that might amount to an ouster ; but the mere non-user by one tenant in common of that which belongs to them both in common can never, *per se*, raise the presumption of a grant ; and to hold that the tenant in common who does not exercise his right is, after twenty years, to be presumed, by the mere non-user, to have made a grant of it to his co-tenant in common, would, indeed, be a monstrous result. The learned Judge, however, puts the matter to the jury in a way which, I conceive, amounts to this, for his charge to this effect, that although the Grogan Morgan family, through whom the defendant claims, were at one time in possession and enjoyment of this right, yet they might have lost it ; and the evidence that they did lose it is simply and merely, that they did not themselves exercise the right. It appears from the evidence that the Grogan family exercised that right down to the year 1798 ; that year they removed to another place, and have not, since then occupied the mansion-house ; but, it is clearly shown by the evidence, that there has been a continual exercise of the right by the Grogan family to the fishery, down to the present time, by all the tenantry of the lands and estates which had been granted by the letters patent. The effect of this evidence could not be got over by saying it was by the plaintiff's permission, when that permission was merely that they so fished, without any interruption by him ; an exclusive right to the fishery could not be thus acquired. But further, the plaintiff himself, instead of claiming a title to the fishery antecedently to and overriding that of the Grogan family, stops at the year 1771 ; he traces his title no further back than that year. He did, it is true, get by this deed of 1771 a right to fish in other parts of the river, where his lands abutted on the river on either side, which may have induced him to think, mistakenly, that it conferred on him that exclusive right of fishery, which he now seeks to establish in the part of the river in question. Upon the whole, therefore, we are of opinion that the verdict in this case cannot be sustained. The only remaining question, therefore, is whether, the plaintiff's case having failed, we should direct a verdict to be entered up for the defendant, or whether we should send down the case to another trial ? But as we consider that

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nothing would be effectuated by our sending the case again down to trial, the proper course will be to direct the verdict to be entered up for the defendant.

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I felt much disposed, at one stage of this case, after hearing what was urged by Counsel at the Bar, to think that the most satisfactory course would be to send this case to a new trial; because I thought that, in point of law, the correct view of the case was not submitted to the jury by the learned Judge. In such a case as the present, there could be no presumption but that of an actual conveyance, whereas it would seem as if the learned Judge thought that the jury might arrive at a presumption of law as giving title to the plaintiff. Upon further consideration, however, I concur in the view that it would be useless to send the case to a new trial, inasmuch as the plaintiff has no means of making out such a title as he has put upon the record by his summons and plaint. Upon the whole, therefore, I am of opinion, that the proper course will be to direct a verdict to be entered for the defendant.

CROSBIE v. MURPHY.*

May 31.

ACTION against an attorney, for negligence.—Defence ; that the defendant used due and proper care and skill in the discharge of his duty ; that the affidavit of registry must accurately comply with the requisitions of the 6th section of that Act.

Therefore, where the judgment debtor, who was an hotel and shop-keeper, was described in the affidavit merely as " Bridget Curran, of Killorhan, in the county of Kerry, widow "—*Held*, insufficient to create a judgment mortgage.

Held also, that the defect was not remedied by the fact that the description in the affidavit of registry strictly followed the judgment.

A mere error of judgment, or a mistake upon a point of law, or in the construction of a difficult Act of Parliament, is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake ; in such cases, regard must be had to all the circumstances of the transaction, and if they be such as show gross or culpable neglect on the part of the attorney, he will be responsible.

* PERRIN, J., *absente*.

T. T. 1858. his duty as such attorney. Upon the trial, before Greene, B.,
^{Queen's Bench} at the Spring Assizes 1858, at Tralee, it appeared that the plaintiff
had agreed to lend a sum of £300 to Bridget Curran, widow, who
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^{MURPHY.} carried on the business of an hotel and shop-keeper in the town of Killorghan; and that, with that view, the plaintiff, accompanied by a friend, who had negotiated the loan, went to the office of the defendant (who it appeared was also attorney for Bridget Curran) for the purpose of having a bond, with warrant of attorney, executed as security for the loan. It having been suggested that under the 13 & 14 Vic., c. 29, a judgment could be made as effectual a security upon land as a mortgage, the plaintiff directed the defendant to do the best he could, the object of all parties being that no avoidable expense should be imposed on Bridget Curran. The suggestion as to the judgment mortgage having been adopted the defendant requested that a description of the parties should be left with his managing clerk, who was about to fill up the bond or warrant; and a description was accordingly dictated by the plaintiff's friend, which was inserted in the bond and judgment, and in the affidavit registered pursuant to the 13 & 14 Vic., c. 29, s. 6; and was as follows:—" Bridget Curran, of Killorghan, in the county of Kerry, widow." Bridget Curran having subsequently become bankrupt, the plaintiff claimed in the bankruptcy to be a creditor by judgment mortgage; but Plunket, J., considering that the description of Bridget Curran, in the affidavit of registry, as "widow," without any further description of her trade or calling, was not sufficient compliance with the 13 & 14 Vic., c. 29, s. 6, to render the judgment a charge upon the lands of the conosor, held that the plaintiff was not entitled to prove in the bankruptcy as a mortgage for the amount of his claim, and therefore levelled it with the other debts. The bankrupt's estate being insufficient to pay more than £159. 6s. 6d. on foot of the £300 lent by the plaintiff to the bankrupt, this action was brought for the balance so lost, as alleged through the negligence of the defendant. The learned Judge directed the jury, that the description of Bridget Curran, in the affidavit of registry, was not sufficient; that it was the defendant's duty to have told the plaintiff, and the parties who came with him

to the defendant's office, that the description given by themselves of the parties to the proposed security was not sufficient; that it was not an answer to the action that the defendant had called for information, which when supplied was defective; and that he should have told the plaintiff that the particulars of description given by the parties was defective. The jury found for the plaintiff. The other facts appear sufficiently in the judgment of the Court.

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J. Clarke, on the 19th of April, having obtained a conditional order to enter a verdict for the defendant, pursuant to leave reserved at the trial, or for a new trial, upon the ground that the verdict was against evidence—

R. J. Lane (with him *E. Sullivan*) now showed cause.

It is clear that the defendant, as the attorney of the plaintiff, did not exercise due care and diligence in the discharge of his duty, in securing the plaintiff's loan upon land, pursuant to an Act of Parliament, the requirements of which, for that purpose, are definite and explicit.

The description of Bridget Curran merely as "widow" is not a sufficient compliance with the 13 & 14 Vic., c. 29, s. 6; the defendant, therefore, has been guilty of gross negligence, and is responsible for the loss which the plaintiff has thereby sustained. That section requires that the affidavit shall state, amongst other things, "the "usual or last known place of abode, and the title, trade or profession of the plaintiff (if there be such), and of the defendant, "or person whose estate is intended to be affected by the registration of such affidavit."—[LEFROY, C. J. Do the words of that section relate to the judgment, or to the affidavit to be registered under the Act?]—To the affidavit, because it is the affidavit which, in point of fact, is the mortgage. Bridget Curran was a trader within the meaning of the bankrupt code; she ought, therefore, to have been described in the affidavit as "hotel and shop-keeper." The word "title," in the 6th section, means a title of honor, such as that of a nobleman, a baronet, &c.; "trade" applies to persons carrying on a trade or business; and "profession" to professional men. The

T. T. 1858. object of the Act was to provide an accurate description of the person against whom the judgment is obtained, and of the land upon which the judgment is to attach as a mortgage. The agreement in this case was, that the money should be effectually secured upon land; and the defendant, having undertaken to accomplish that, neglects to comply with the requirements of the Act, and the plaintiff, therefore, not having obtained a valid security, has sustained this loss. As to what constitutes negligence in an attorney, I admit that if there be a difficulty in the construction of an Act of Parliament, the attorney is not answerable for a mistaken construction; but when the Act clearly points out what is to be done, and the attorney knows that the validity of his client's security depends upon his complying with the requisitions of the Act, his omitting to do so is gross negligence. This distinction is laid down by Lord Lyndhurst, in the case of *Stevenson v. Rowand* (a) thus:—"A solicitor is not liable for mistake in a nice and difficult point of law, for to such mistakes all lawyers must be liable; and if the question had been merely one of that description, I would say Mr. Stevenson was not responsible; but here he thought proper to depart from the ordinary mode of preparing heritable securities, and in so doing he must be considered as undertaking to do what was necessary to render the mode which he adopted sufficient for its purpose; and if, whether from ignorance or inadvertence, he failed to do so, he must be held responsible for the consequences." So also in *Hart v. Frame* (b), Lord Cottenham says:—"Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and where an injury has been sustained, which could not have arisen, except from the want of such reasonable skill and diligence, or the absence of the employment of either on the part of the attorney, the law holds him liable" (c).

(a) 2 Dow. & C. 104, 119.

(b) 6 Cl. & Fin. 193.

(c) p. 210.

This case is exactly in point; the Act in question is clear and explicit in its requirements, and the default of the attorney, in neglecting to comply with them, is the absence of that reasonable diligence which renders him responsible.

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Serjeant Deasy (with him J. Clarke), contra.

The question is not, whether the registration of the particular judgment is void, but whether, being insufficient, the consequences of that insufficiency are to be visited upon the defendant? The object of the Act is to enable a party to register his judgment, and thereby to give to it the effect of a mortgage. All the provisions of the Act are directory, not mandatory—its enactments are affirmative, not negative; and there is no provision that if any of the particulars required by the Act be omitted, the judgment shall be null and void, as is the case in the Bills of Sale Act (17 & 18 Vic., c. 55). The object of the affidavit is to identify the cooperator of the judgment with the lands, and to show that he is the same person as the person against whom the judgment has been obtained. The words "if there be such," in the 6th section, must refer to the immediate antecedent, viz., trade, title or profession; and if enough appears to identify the party with the lands, that is sufficient. The affidavit has strictly followed the judgment; and that being so, can it be said that the defendant is guilty of such gross negligence as renders him responsible to the plaintiff, because the Bankrupt Court has decided that the affidavit is insufficient?—[LAWRENCE, C. J. In the Registry Act there is no provision annulling the registration, and yet very minute variations have been held sufficient to nullify it.—CRAMPTON, J. Your proposition is this, that you follow the judgment, and that that protects the defendant; but you do not say that the judgment follows the directions of the Act.]—We contend that the description of Bridget Curran here is quite sufficient. It is said in *Com. Dig.*, tit. *Abatement*, F, 26: "The addition of the estate is good—as 'widow,' 'single woman.'" It is to be observed that the words of the Act, "title, trade or profession," are disjunctive; so that if one or other of them be inserted in the affidavit, it is quite enough; and as Bridget Curran is de-

T. T. 1858. scribed as "widow," that is sufficient to identify her with the lands
Queen's Bench The word "title," in the 6th section, means "addition;" and the
CROSBIE object of the Act being to place the judgment creditor in the same
v. position as if the debtor had executed an ordinary mortgage to
MURPHY. him; since in a mortgage deed the title "widow" would be suffi-
 cient, so it is a sufficient description in this affidavit, to which it
 gives the effect of a mortgage.

Next, as to the liability of attorneys.—The judgment of Lord Mansfield, in *Pitt v. Yalden* (*a*), is very apposite:—"That part of "the Profession which is carried on by attorneys is liberal and "reputable, as well as useful to the public, when they conduct "themselves with honor and integrity; and they ought to be pro- "tected when they act to the best of their skill and knowledge. "But every man is liable to error; and I should be very sorry that "it should be taken for granted that an attorney is answerable for "every error or mistake, and to be punished for it by being charged "with the debt which he was employed to recover for his client "from the person who stands indebted to him." So in *Bailey v. Chandless* (*b*), it is said an attorney is only liable for *crassa negligencia*; and in a case of *Compton v. Chandless*, cited in *Bailey v. Chandless* (*c*), and decided in 1802, Le Blanc, J., says:—"An attorney is only bound to use reasonable care and skill in managing "the business of his client." In *Purves v. Landell* (*d*), Lord Brougham says, p. 100:—"There must be considerable mismanag- "ment, considerable ignorance, and the absence of attentive condes "in general; unless it is gross, the law holds it is sufficient." This is a most difficult and doubtful Act of Parliament, and all that can be said is, that the defendant has misconstrued it, which, in the opinion of Parke, B., in *Elkington v. Holland* (*e*), does not render him liable to his client; and to the same effect is the judgment of Tindal, C. J., in *Godefroy v. Dalton* (*f*). The cases of *Stevens v. Rowand* (*g*), and *Hart v. Frame* (*h*), do not apply: in the

(*a*) 4 Burr. 2060, 2061.

(*b*) 3 Camp. 17.

(*c*) 3 Camp. 19.

(*d*) 12 Cl. & F. 91.

(*e*) 9 M. & W. 659, 661.

(*f*) 6 Bing. 460, 468.

(*g*) *Supra.*

(*h*) *Supra.*

former, the decision was entirely based upon this, that the attorney had deviated from the ordinary mode of proceeding; in the latter, that had the attorney only looked into the Act of Parliament, he could not have made the mistake.

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E. Sullivan, in reply.

It is said, on the other side that, to secure money by a judgment mortgage is an unusual and most difficult mode of securing it. If that be so, why then does the attorney in this case select that species of security, his agreement with his client being to secure the money lent, in the best and most effectual mode, upon land? This is exactly the case of *Hart v. Frame* (*a*). As to the construction of the Act of Parliament, the rule to be adopted in the construction of statutes is laid down by Burton, J., in *Warburton v. Irie* (*b*). The object of the 6th section of the Judgment Act is to enable the conusor at once to put his hand upon the person whose property he seeks to affect by his judgment. Suppose the case of a person having at one time possessed property which he had subsequently lost, and had then gone into trade, and acquired new property, could it be contended that his original description as an esquire or otherwise would be sufficient, or would not such a description as that be calculated to mislead? The Act requires not only that the contents of the judgment should be followed in the affidavit, but also that, in addition, the residence, trade and calling of the conusor shall be stated. All these matters are for the purpose of identification, and to show by the registry how the property to be charged by the judgment is circumstanced. When the Act, in the 6th section, uses the words "the usual or last known place of abode," can it be said that that is where the conusor may have previously lived? Can this mean his place of abode as set out in the judgment? If then the conusor's present place of abode must be stated in the affidavit, the other requirements are equally necessary, being all mentioned in the same clause of the section. If the description of the parties in the judgment be sufficient for the purposes of identification, why should the Act require a repetition of it in the affidavit? The 6th section

(*a*) *Spræ.*

(*b*) 1 H. & Br. 648.

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must be read thus—the usual place of abode (if there be such), the title (if there be such), the trade or profession (if there be such). If the party have not any of these, of course they need not be inserted in the affidavit. The defendant has been guilty of gross negligence in omitting to describe Bridget Curran as of her trade. It is true that an attorney is only required to have a reasonable amount of skill and knowledge, and that, where a difficult point of law might be required to be decided, he would not be responsible for a mistake; yet when an Act of Parliament plainly directs him to do certain specific things, if he fails to comply with the directions of the Act, he is liable for the consequences.

LARNER, C. J.

In this case, we have no doubt as to the construction which we ought to put upon this Act of Parliament; and it is very right that we should give a distinct opinion upon the point in question, because, as it has been properly said, both the public and the Profession are greatly concerned in its being known what is its true construction. The construction is perfectly plain and simple, when we read the Act according to what appears to be the true grammatical meaning of the terms employed in it; and I may remark that the observations made upon this part of the case during the argument are quite decisive, namely, that there are words which provide, in the first place, that everything upon the face of the judgment must, of necessity, be inserted in the affidavit; and if nothing more were meant than to transfer to the affidavit the description of the party as set out in the judgment, then to what purpose shall we apply, or what necessity is there for, the additional words which the Legislature has said shall be inserted in the affidavit? precise words, which, no doubt, are to provide for the change of circumstances which may occur in the course of time. For see how well these provisions agree together. The Act provides for the registry of bygone as well as of recent judgments; and, therefore, with a view to the identification of the parties, it requires an accurate record of any change in their circumstances. With respect, therefore, to the meaning of the Act of Parliament, we have no

doubt. We cannot, however, overlook all the circumstances of this case, nor disregard all the authorities which lay down the rule, how far an attorney is liable for negligence. They all come to this, that each case must, to a certain degree, depend upon its own circumstances. Here, it does not appear that the plaintiff, either originally or in the course of the loan, stipulated for or stated that he was desirous to have the security of a mortgage, which would have relieved him from the risk and danger arising from trusting to a security which must depend upon the affidavit being duly registered; on the contrary, a mortgage was objected to on account of the expense. Again, the party is called upon to furnish the defendant with a description of the parties to the judgment; and accordingly, a description, which was supposed to be that of the parties at the time, was given and taken down in writing. Well, we find that the warrant of attorney executed on this occasion expresses that there shall be a stay of execution for a certain time, which clearly shows that, in the first instance, the plaintiff was desirous not to have a mortgage as his security, but to have a judgment with a stay of execution; he is willing to trust to that security, which must depend for its efficiency as a charge upon land upon the affidavit being duly registered; and the attorney does seem to have thought, according to the best of his judgment, and according to his notion of the requirements of the Act of Parliament, that if the affidavit complied with the description furnished to him by the parties, that he would have discharged the duty with which he was intrusted by them. Being thus called upon to carry out what appeared to him to be the intention of the parties, and being required to do so immediately and without delay, he proceeds, according to his conception of this Act of Parliament, to prepare the affidavit according to the instructions which the parties gave him, and in order to carry out the objects which they had in view of avoiding expense, and completing the transaction as quickly as possible, by a judgment registered as a mortgage. In doing so, however, he makes a mistake. Now, what do all the cases say upon this subject? They say this; a mere error of judgment, a mere mistake upon a point of law, will not render an attorney

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liable; that does not amount to *crassa negligentia*. In the present instance, there was no usual, accustomed or settled form of affidavit, no judicial decision which had put the matter at rest, as to what was a sufficient affidavit in compliance with the requisitions of this Act. The case therefore is very like those cases decided upon the Annuity Acts in England, before anything was settled as to the mode of registering the memorial of an annuity grant. In those cases, the attorney having registered the memorial in a manner which subsequent decisions declared to be insufficient, he was held not to be liable for the mistake so made by him. Here, there is no settled form, as there was in the Scotch case (*a*), where the attorney having received instructions to prepare a heritable bond for which there was a usual and settled form, deviated from the form. See also what Lord Mansfield says, in the case of *Pitt v. Yalden* (*b*), "That in that case the attorneys were not answerable "for the mistake they had made, they not appearing to have been "grossly negligent, or grossly ignorant, or intentionally blameable; "they might not, and probably did not, know that the point of law "in question was settled. The words of the Act are not so explicit "as to direct them clearly." Upon the whole of this case, therefore we think that we have not any ground for saying, in accordance with the authorities, that this is a case of *crassa negligentia*, for which the defendant, as an attorney, should be made liable. This is the point for our consideration; and it comes really to the question, what is the rule of law applicable to such cases as the present? We are of opinion that the rule is this, in order to render an attorney liable, you must, having regard to all the circumstances, make out a case of *crassa negligentia* against him. In the present case, we think that there are circumstances which preclude us from saying that it is a case of *crassa negligentia*.

CRAMPTON, J.

I just wish to add this, that I am entirely of the same opinion with my LORD CHIEF JUSTICE. I think the Act of Parliament

(*a*) *Stevenson v. Rowand* (2 Dow. & Cl. 104).

(*b*) 4 Burr. 2060, 2061.

cannot bear the construction contended for by the Counsel for the defendant. It appears to me, that the words of specification all point to matters which ought to be inserted in the affidavit, and have a much more extended signification than that contended for by Serjeant *Deasy* and Mr. *Clarke*. It is most material that the designation of the party against whom the judgment mortgage is to be obtained should be stated with precision and accuracy. In this case, there was no judgment entered up at all at the time of the transaction in question. The parties have a meeting, and a discussion ensues as to whether the security shall be by way of mortgage, or by a judgment to be registered as a mortgage, pursuant to the provisions of this Act of Parliament. The parties on both sides require that no expensive proceedings shall be taken; and they are quite satisfied that the security shall be a judgment registered as a mortgage. Well, what occurs? A mistake is made by both parties, although, at the same time, I must say that there was some neglect on the part of the attorney, in not more particularly inquiring as to the person against whom the judgment was to be obtained; yet, in my opinion, that does not amount to *crassa negligentia*—to that gross or culpable neglect for which the attorney is to be made liable. It is by no means easy to draw the border line of that gross description of negligence which, for want of an appropriate English word, has been denominated *crassa negligentia*. Upon the whole, therefore, my distinct opinion is, that the construction of this Act of Parliament contended for by Mr. *Lane* and Mr. *Sullivan* is the true one. That there has been some negligence on the part of the attorney, there can be no doubt; but it is not that *crassa negligentia* which renders him liable at the suit of a client who has suffered by the error into which he has unfortunately fallen.*

O'BRIEN, J., concurred.

* See 21 & 22 Vic., c. 105.

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v.

THE WATERFORD AND KILKENNY RAILWAY CO.

Jan. 22.
June 1.

Where a master employs servants competent to discharge their duties, and is not himself personally in default, he is not liable for an injury occasioned to one servant through the negligence of another, if they are at the same time engaged in a common service and a common employment:—

And, therefore, where the plaintiff, a hired labourer of a Railway Company, while working upon the Railway was injured by one of the Company's trains running against him, which train was guided by others of the Company's servants, who were fit and competent to discharge their duties:—
Held, that the Company was not liable to the plaintiff for the injury which he had sustained.

It is the duty of servants, both as regards the interests of their employer and their own safety, by the exercise of ordinary care and caution to prevent and avoid accident.

ACTION against a Railway Company, for injuries caused by a train running against the plaintiff.—Count; that the defendants, before and at the time of the committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain Railway, to wit, the Waterford and Kilkenny Railway, and of certain locomotive engines and carriages used by them in, upon and along the said Railway; and the said plaintiff, on the 19th day of November 1856, at the request of the said Company, became and was a hired labourer of the said Company, to work for the said Company, in and upon the said Railway, for certain reasonable reward in that behalf; and thereupon it became and was the duty of the said Company to use due and proper care and skill in and about the conducting, managing and directing the said locomotive engines and carriages in, upon and along the said Railway; yet the said Company, notwithstanding their duty in that behalf, on the said 19th day of November 1856, did not use due and proper care and skill in and about a certain locomotive engine and carriages used by said Company in, upon and along the said Railway, but then took so little care, and so negligently and unskillfully conducted themselves in and about the conducting, managing and directing the said locomotive engine and carriages along the said Railway, that, by reason of such want of care and skill of the said Company, the said locomotive engine and carriages were driven and impelled against the said plaintiff with great force and violence, whilst he, the said plaintiff, was of right and lawfully in and upon the said Railway, and engaged in and about the work and business of the said Company, as such

labourer as aforesaid, whereby and by reason of the premises the said plaintiff was grievously wounded and injured; and also by reason of the premises became sick, and suffered great pain and anguish, and was confined to his bed for the space of one month, and has also ever since been, and still is, very much weakened and broken in health, constitution and bodily strength, whereby and by reason whereof he is deprived of the opportunities and means of earning and acquiring the usual gains and profits from his manual labour, which theretofore he was in the habit of earning and acquiring, and but for the premises would still continue to earn and acquire; to the damage of the said plaintiff, &c.

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Defence; that the grievances complained of in the said summons and plaint happened to the plaintiff, and the said locomotive engine and carriages in the plaint mentioned were driven and impelled against the plaintiff, as in the said plaint stated, not through the want of care and skill of the defendants, but solely by and through the carelessness, negligence, unskilfulness and default of the servants of the defendants, who were, before and at the time of the committing of the said grievances, employed by the defendants in and about the management and care of the said Waterford and Kilkenny Railway, and the sidings connected and communicating therewith, and who at the same time had the guidance, conduct, directing and management of the locomotive engine and carriages; and by and through the want of due care and attention on the part of the said servants, and not by or through any other negligence, unskilfulness, default or want of due care and attention: and the defendants aver that the said Railway and sidings, and the said locomotive engine and carriages, were, before and at the said time respectively, under the management, care and guidance, conduct, government and direction of the servants of the defendants, and no other person or persons, and that the said several servants were then severally fit and competent persons to have the management and care of the said Railway and sidings, and to have the management, guidance, conduct, government and direction of the said locomotive engine and carriages respectively, as the plaintiff before and at the time well knew: and the defendants further aver that the said carelessness,

T. T. 1858. ness, negligence and unskilfulness, and want of due care and attention of the said servants of the defendants, at the said time and always, were wholly unauthorised by the defendants, and were entirely without the leave and license, knowledge, sanction or consent of the defendants.

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Demurrer to this defence.*

Jan. 22. The case was argued in Hilary Term 1858, by *F. Smith* and *D. Lynch* in support of the demurrer, and by *C. H. Tandy* and *J. E. Walsh*, contra.

June 1. The Court now directed the case to be re-argued by one Counsel on each side, and called upon—

C. H. Tandy, in support of the defence.

The question in this case is, whether the servants of a common master are answerable for each other's acts? The principle upon which a master is liable to strangers, for the acts of his servants, does not touch the present question. That liability is in the nature of tort, is founded upon public policy, and depends upon the maxim "*respondeat superior*," because there cannot be a contract with strangers; but the master's liability and obligations in respect of his servants, *inter se*, depend upon contract. In the present case there is no express contract; and if the other side be right in the argument, that an implied contract arises from the relation subsisting between the plaintiff and defendant, the result would be that, if a master has several servants, he is responsible for an injury caused

* NOTE.—The following points of demurrer were assigned:—First; that the defence raises an immaterial issue, as it is immaterial whether or not the said servants, in the committing of the said grievances in the plaint mentioned, were wholly or at all unauthorised, or did the same entirely or at all without the leave or license, knowledge, sanction or consent of the defendants, as in the said defence mentioned.

Secondly; that it is immaterial to the plaintiff and his said cause of complaint whether or not the said servants of the defendants were severally fit and competent persons, as in the said defence mentioned, and whether or not the plaintiff knew the alleged fact that the said servants were such fit and competent persons.

Thirdly; that it is not averred by the defence, that the said servants of the defendants wilfully, designedly or maliciously drove or impelled the said engine and carriages against the said plaintiff, and wilfully, designedly or maliciously forbore to exercise due care and attention about the said Railway and sidings.

to any one of them by the act of any other of them. But, on the contrary, the contract which the law implies is, that the servant undertakes his employment subject to all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as the servant of him who is the common master of both: *Hutchinson v. The York, Newcastle and Berwick Railway Co.* (a). In *Seymour v. Maddox* (b), the duty of the master, the owner of a theatre, to light the stage floor sufficiently, and to fence a hole in it, was expressly averred, and a breach of it laid in the declaration; but Lord Campbell, C. J., says:—"The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration, nor from the general relation of master and servant" (c). It is in the power of the servant to enter into an express contract with the master, if he thinks fit.—[PEARIN, J. Suppose the injury is caused by the negligence of the master himself?]—In that case the master himself is liable: *Vose v. The Lancashire and Yorkshire Railway Company* (d); but even in that case Pollock, C. B., says:—"In my opinion we ought to be extremely cautious not to relax the rule originally laid down in this Court, that, with respect to servants in a common employ, the master cannot be made answerable for an injury caused to one servant by the negligence of another. Few rules of law are of greater practical importance. The law must have been the same long before it was enunciated in this Court in the case of *Priestly v. Fowler*" (e). The leading case on this subject is *Priestly v. Fowler*; in which the declaration stated that the defendant, having directed the plaintiff as his servant to carry goods in a certain van, it became the defendant's duty to take care that the van was in a proper state of repair; and the plaintiff complained of an injury arising from an imperfection in the van; but it was held that the action did not lie. That case has been followed and upheld in all the subsequent cases: *Skipp v. Eastern Counties*

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(a) 5 Exch. 343; S. C., 6 Railw. Cas. 580; 19 Law Jour., Exch. 296; 14 Jur. 837.

(b) 16 Q. B. 326; S. C., 15 Jur. 723; 20 Law Jour., Q. B., 327.

(c) p. 330.

(d) 2 H. & N. 726, 734; S. C., 4 Jur., N. S., 364; 27 Law Jour., Exch., 249.

(e) 3 M. & W. 1.

T. T. 1858. *Railway Company (a); Tarrant v. Webb (b).* It is the duty of the master to use reasonable care in selecting competent servants; and the defence, in the present case, avers that the servants were severally fit and competent persons: *Wigmore v. Jay (c); Wiggett v. Fox (d); Degg v. The Midland Railway Co. (e)*.—[LEFRoy, C.J. Has a servant who is injured no remedy?]—He can maintain an action against his fellow-servant: *Farwell v. The Boston and Worcester Railroad Corporation (f)*. It is not material, as will be argued on the other side, that the servant who is injured, and the servant by whom the injury is caused, should be engaged in the same identical employment. In *Hutchinson v. The York, Newcastle and Berwick Railway Company (g)*, the plaintiff's husband, who was a servant of the defendants, and travelling in one of their trains, was killed by a collision with another of their trains; and it was urged that the principle established by *Priestly v. Fowler* did not apply, because, even admitting that the defendants were not liable for the negligence of their servants who were managing the train in which the deceased was travelling, yet there could be no principle exempting them from liability for the acts of their servants who were managing the other train, and therefore were not engaged in a common act of service with the deceased; but Alderson, B., who delivered the judgment of the Court, says, in reference to that argument, “We do not think there is any real distinction between the two cases” (h).

D. Lynch, for the demurrer.

It must be admitted that, at Common Law, this action would lie against strangers; and is it then to be said that the plaintiff is to be excluded from that protection which is extended to strangers? The

(a) 9 Exch. 223.

(b) 18 C. B. 797; S. C., 25 Law Jour., C. P., 261.

(c) 5 Exch. 354; S. C., 14 Jur. 837; 19 Law Jour., Exch., 300.

(d) 11 Exch. 832; S. C., 2 Jur., N. S., 955; 25 Law Jour., Exch. 188.

(e) 1 H. & N. 773; S. C., 3 Jur., N. S., 395; 26 Law Jour., Exch., 171.

(f) 4 Metcalfe's Amer. Rep. 49; cited *Storey on Agency*, 2nd ed., 567.

(g) *Supra*.

(h) p. 352.

defence alleges that the injury was caused to the *plaintiff* by the negligence of the defendant's *servants*. A distinction is thus taken between the employment of the plaintiff and of the servants of the Company, and it does not therefore appear by the defence that the plaintiff was a *servant* of the Company. But even if it did appear that there was a common service between the servants of the Company, by whose negligence the injury was caused, and the plaintiff, that will not bring the defendants within the principle of the cases which are relied upon on the other side, because there is no averment, in the present defence, of a common employment.—[CRAMPTON, J. In fact you say there must co-exist a community of service and a community of employment, and that that does not appear in this case?—]Yes, there should have been an averment of a common duty both on the part of the plaintiff and of the servants of the Company. That principle pervades all the cases which have been cited on the other side. According to the plea in the present case, the employment of the plaintiff may have been a mere casual employment. Suppose a glazier had been employed to put in a pane of glass in a window at the Railway station, and the train, through gross negligence, had been suffered to run up to the window, and to injure him, could it be contended that, because he was at that moment in the employment of the Company, he was therefore precluded from recovering damages in an action for the injury, and that he was beyond the protection which the Common Law extends to every stranger? Suppose again the case of a master employing persons to carry on different trades in different places; because it happens that there is a common service, is that to create the exemption from liability? The true principle to be found in all the cases is this—that to create the exception there must be one common employment, entailing upon the servants one common duty, which cannot be split up between them, so as to say, so much of the duty belongs to one, and so much to another.—[LEFROY, C. J. Was not the plaintiff in the present case as much in a common employment as the plaintiff in *Hutchinson v. The York, Newcastle and Berwick Railway Company?* (a). The principle which you contend for is

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(a) *Supra.*

T. T. 1858. most important, and would go really to the good sense of the thing,
Queen's Bench if you could sustain it.]

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We all feel that it is impossible to distinguish this case substantially from the authorities which have been cited at the Bar upon the part of the defendants. Those authorities have gone to a great length in exempting the master from liability in respect of injuries caused by one of his servants to a fellow-servant, in those cases where what is called community of service or community of employment is found to exist. We do not say that community of employment (that is, the being engaged in the identical work in the course of which the accident occurred) is to be found in all the cases ; on the contrary, in some of the cases, instead of a common employment upon the same identical work, there was only a general community of employment ; yet the same rule has been applied to the latter class of cases as well as to the former. We cannot therefore say that, in the present case, there was not that extent of community of employment and community of service which, at all events, brings it within the authority of those cases in which a general community of employment has been held to be quite sufficient to exonerate the master from this liability. Taking the plaint and defence together, there is strong ground for holding that the plaintiff brings himself within the meaning of the rule ; he is in the employment of the Company, working on their Railway at the very time when this accident occurs ; and whatever good sense is, upon consideration, to be found in the rule, in the abstract, as it has been laid down, it strikes me at all events as a reasonable principle, that it is a duty which an employer may well be supposed to expect from all persons who are employed by him, that their best efforts shall at all times be exerted for his benefit. To apply that principle to the present case : it may be said, was it not the duty of all the labourers employed upon these Railway works to guard against the occurrence of any accident to themselves—to take care that the trains should not be imperilled by running against their tools or the like ? Was it not their duty, both as regards the interest of their

employers and their own safety, to avoid exposing either the trains or themselves to accident by their negligence? Was not this an ordinary care and caution which they were bound to exercise?

Under all these circumstances, and without saying what qualification it may be found necessary in the course of experience to impose upon the rule hitherto laid down, we are not now called upon to say that the present case either goes beyond or falls short of the cases which have been already decided upon similar questions. We must therefore overrule this demurrer, and hold that this case is within the principle of those cases which have been cited, and that the defendants are exempted from this liability.

CRAMPTON, J.

I entirely concur in the opinion of my LORD CHIEF JUSTICE. I think this case cannot be distinguished in principle from those which have been decided, from the case of *Priestly v. Fowler* down to the present year; they all affirm the same principle. It may be that this principle, which is here contended for by the defendants' Counsel, is not very old as a rule of our law; but the question for us is, must we not follow the rule which we find in the cases which have been cited? What then is the principle to be extracted from these cases? It is that which has been laid down by the Counsel for the defendants; namely, where the master is not personally in any default, and an accident occurs by the negligence of his servants, by which one servant out of two or more in his employment is injured, the master is not liable, provided the servants are in the same service, and in the same employment, at the same moment of time when the accident occurs. They must be in the same service, and they must be at the particular time in his common employment, in order to make the master liable; and laying down the rule thus, that a common service, and a common employment at the time of the accident, are requisite in order to avoid the liability upon the part of the master, you reconcile all the cases upon the subject; and then the only question is, whether or not the present case comes within that rule? Nothing can be more plain than that it does. The plaintiff here was a labourer, hired to work for the Company, and being a servant of the Company, it matters not for what period of time he was

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employed. The plaintiff avers that the injury happened to him through the negligence of the defendants. The defendants, however, admitting that the accident did occur, say that it did not occur through their negligence, but that it occurred through the negligence of some of their other servants, who, nevertheless, were fit and competent persons to discharge their duties. Here then we have the plaintiff and these other persons, who were fit and competent, together in the same service. But besides this, which is most material, we have them, as shown by the pleadings, employed upon the same Railway, in the same service, at the same moment of time. What further is required? This case seems to me to fall within the principle of the case where, through a workman's negligence, a brick fell from the top of a tower upon a workman below, who was in the same employment, but was not occupied in doing the very same piece of work as the workman from whose hands the instrument which caused the injury fell: *Wiggett v. Fox* (a). Under these circumstances, it is my opinion that this demurrer should be overruled.

PERRIN, J.

I cannot see the reason, the principle or justice of the authorities which have been cited. But those authorities have been decided; and the present case, in my opinion, falls within the ambit of those decisions. Without saying anything, therefore, upon the justice of those authorities, I think that this case falls within the principle which is now held to be the law as ruled by a number of cases, and I am therefore of opinion that this demurrer must be overruled.

O'BRIEN, J.

I quite concur in the judgment of my LORD CHIEF JUSTICE and the other Members of the Court; and however hard the rule may be, it is impossible to distinguish the present case from those which have been cited, particularly the case of *Hutchinson v. The York, Newcastle and Berwick Railway Company*.

Demurrer overruled.

(a) *Supra.*

NOTE.—See *The Barton's Hill Coal Co. v. Reid* (4 Jur., N. S., 767, Dom. Proc.), and *The Barton's Hill Coal Co. v. M'Guire* (4 Jur., N. S., 772, Dom. Proc.)

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THE HIBERNIAN MINE COMPANY v. TUKE.*

June 5.

ACTION for tolls and duties.—The plaint in the first count stated, that the defendant was indebted to the plaintiffs in the sum of £3. 7s. 8d., money payable by the defendant to the plaintiffs, for divers tolls and duties, due and of right payable by the defendant to the plaintiffs, in respect of the vessel or ship of the defendant called the E. T., which entered the port or harbour of Arklow, drawing more than five feet of water on seven several days, to wit, &c.; and which said vessel then and there drew more than five feet of water, being at the rate of two pence per ton upon every ton of the tonnage of the said ship or vessel of the defendant, called the E. T., for every time the said ship or vessel entered the said port or harbour of Arklow.

The plaint also contained similar counts in respect of other vessels.

Defence; that the vessel called E. T. did not, on the occasions on which said tolls and duties are claimed, draw more than five feet of water, *when entering the harbour of Arklow.*

Upon the trial, before Keogh, J., at the Spring Assizes at Wicklow, 1858, it appeared that the plaintiffs were incorporated by the 32 G. 3, c. 24 (*Ir.*),† and that by the 5th section of that Act, they were

By the 32 G.
3, c. 24 (*Ir.*).
The Hibernian
Mine Com-
pany, which
was thereby
incorporated,
was empow-
ered to open
and improve
the harbour of
Arklow. In
consideration
of the expense
and risk in
making and
maintaining
such harbour,
the Company
was thereby
authorised,
“from time to
time, and at
all times there-
after,” to levy
a toll not ex-
ceeding 2s.
per ton, upon
“every ship or
other vessel en-
tering the said
port or har-
bour, drawing
more than five
feet of water.”

—Held, that

the Act imposed the toll upon a class of vessels entering the harbour, whose ordinary draught of water exceeded five feet, and that a vessel whose ordinary draught exceeded that depth was not exempt from toll, although when entering the harbour she might not actually draw five feet.

Although, when an Act of Parliament, imposing a duty or toll, is equally capable of two constructions, it is to be construed so as to relieve, and not to impose a burden upon the subjects of the realm, yet, if of the two constructions the one is reasonable, and will effect the object of the Act, which the other construction will not, the former is to be adopted. [Per LEFROY, C.J.]

* PERRIN, J., was in the Consolidated Nisi Prius Court.

†By the 32 G. 3, c. 24 (*Ir.*), s. 1, the Hibernian Mine Company is incorporated. The 2nd section is as follows:—“And as it would greatly tend to the encouragement of commerce, and the advantage of this kingdom, the opening and improving [the harbour of Arklow, and making a canal or inland navigation from the aforesaid harbour to the Meeting's Bridge, near Rathdrum, and extending

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empowered to charge certain duties for every ship or other vessel entering the port of Arklow, drawing more than five feet of water. That the vessel in question, in ordinary sailing trim, drew five feet six inches of water; but that in order to enter Arklow harbour, it was necessary to "trim" the vessel, by bringing part of the cargo to the forepart, so as to diminish the draught of water at the stern, where the vessel drew the greatest depth of water, and where

the same canal or navigation towards the Kilkenny collieries and Glenmalur mines: be it enacted, by the authority aforesaid, that the said Hibernian Mine Company shall stand, and are hereby invested with, and hold and enjoy all and singular the powers, privileges, advantages and authorities in all things, for the purpose of opening the harbour of Arklow, and carrying on the aforesaid navigation, as were, before the passing of this Act, vested in the Corporation for promoting and carrying on an Inland Navigation in Ireland, and as were then vested in the Company of Undertakers of the Grand Canal, and as were vested in the Royal Canal Company, for the purpose of enabling them to carry on the same navigation, as, by an Act passed in the 30th year of the reign of his present Majesty, entitled 'An Act for the better enabling the Royal Canal Company to carry on and complete the Royal Canal, from the city of Dublin to Tarmonbury on the river Shannon;' and further, that the said Company be and are hereby empowered and authorised to make such navigable cut or cuts, from such part or parts of the aforesaid line of navigation, up the Aughrim river towards the collieries, and up the river Avonbeg towards Rathdrum and the Glenmalur mines, and open all rivers &c., in the directions aforesaid, as may, by the said Hibernian Mine Company, be judged necessary for carrying on the said works, and supplying the said navigation with water."

By the 3rd section, power is given to the Company to raise, by subscription, a joint-stock capital, which, by the 4th section, is to be divided into shares of £100 each.

The 5th section is as follows:—"And be it enacted by the authority aforesaid, that in consideration of the expense, risk and trouble which the said Company shall be put to, in making and maintaining the said harbour and navigation, and the off branches thereof, it shall and may be lawful, to and for the said Company, and their successors, from time to time, and at all times hereafter, to ask, demand, receive and sue for, to the use of the said Company and their successors, the several rates and duties hereinafter mentioned (that is to say), *for every ship or other vessel, entering the said port or harbour, drawing more than five feet water,* the said Company shall be entitled to levy a toll not exceeding two shillings per ton, and for every boat or other vessel navigating the said navigation and off branches, or any part thereof, either upwards or downwards, in which any goods, merchandise or commodities, or other matter whatever shall be carried, such rates and duties as the said Company shall ordain and appoint, not exceeding the sum of two pence for every mile, for and upon every ton of the burden or tonnage of such boat or other vessel; or for every ton weight on all corn, meal, malt, flour, lime, limestone, coal and calum, for the purposes of burning lime, brick, or for household purposes; and the sum of four pence for every other article which shall be

her draught was consequently measured. That when so "trimmed," the vessel did not draw five feet of water; that, according to the evidence of the defendant, the necessity for "trimming" the vessel arose from an obstruction or shifting bar at the entrance of the harbour, on which the vessel, unless so "trimmed," might strand or be wrecked; and that at neap tides there was often not more than three, four or five feet of water upon this bar; but the plaintiffs' evidence suggested that the "trimming" was resorted to merely for the purpose of bringing the draught of water under five feet, so as to evade the plaintiffs' toll.

The defendant also produced witnesses, who proved that the vessel was "trimmed" in the course of fair and prudent seamanship, and not by fraudulent design to evade the toll.

The defendant's Counsel asked the learned Judge to tell the jury that if, *bond fide*, and for the purpose of safe and proper navigation, the vessel was "trimmed" when entering the port (in the mode described in the evidence), so as not to draw five feet of water, they should find for the defendant, even though they might be satisfied

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carried upwards or downwards, upon the said navigation, at the discretion of the said Company; and an additional rate, not exceeding two pence per ton, for every lock which shall be passed by any such vessel, through the communication of the said navigation."

The 6th section is as follows:—"And be it further enacted, that the said Company may, in like manner, ask, demand, receive and sue for, to the use of the said Company, for each passenger in any vessel navigating upon the said canal, any sum not exceeding two pence, for every mile such passenger shall be carried: provided that if, at any time hereafter, a grant of money shall be made in pursuance of any Act or Acts of Parliament in this kingdom, of a moiety of such sum or sums of money as shall be proved before the Commissioners of Public Accounts to have been expended, which proof they are hereby required to give every year, till the whole work is completed by the said Hibernian Mine Company, in improving the harbour of Arklow, pursuant to their petition presented to the House of Commons, this Session of Parliament, so as that no greater sum of money shall be paid, on account of this moiety, than the sum of £2500; that then, and in that case, no greater toll shall be taken on any vessel entering the said harbour of Arklow, than three pence per ton, on all coasting vessels, and six pence per ton on all other vessels, together with such wharfage as is allowed to the Company of Undertakers of the Grand Canal, by an Act passed in the 31st year of the reign of his present Majesty, entitled 'An Act for directing the further application of the sum of £200,000, granted by an Act passed in the 29th year of his present Majesty.'"

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that the ordinary draught of the vessel, in her usual sailing trim, exceeded that depth.

His Lordship, however, declined to do so; but directed the jury to find for the plaintiffs if, on the evidence, they were satisfied that the vessel, the E. T., "drew more than five feet of water," these words to be understood in their plainest and broadest sense, as referring to her ordinary draught of water, even though, on the particular occasions in question, the vessel might have been "trimmed," when entering the harbour, so as not to draw more than five feet of water.

The jury found a verdict for the plaintiffs, for the amount claimed.

R. Armstrong having, on a day this Term, obtained a conditional order to set aside the verdict, on the ground of misdirection.—

D. Lynch (with him *Piers White*) now showed cause.

The sole question is, was the vessel liable to the toll, as entering the harbour of Arklow, drawing more than five feet of water? This question depends upon the construction of the 32 G. 3, c. 24 (*Ir.*), s. 5; and we submit that the words, "*drawing more than five feet of water*," in that section are intended to designate a particular class of vessels. The argument on the other side must go to this, that if, by management, a vessel's proper and usual draught of water can be reduced, so that, at the moment when she is crossing the bar and entering the harbour, she draws less than five feet of water, she is exempt from toll; notwithstanding that when she comes up to the quay, inside the harbour, she draws more than five feet of water.

—[He was then stopped by the Court].

R. Armstrong and *J. E. Walsh*, contra.

The vessel was not trimmed fraudulently to avoid the toll, but, *bona fide*, and in the course of prudent seamanship, in order to enable her to enter the harbour safely. The 32 G. 3, c. 24 (*Ir.*), s. 2, imposes upon the plaintiffs the duty of opening the harbour of Arklow; and the 5th section, in consideration of the expense which the plaintiffs would incur in making and maintaining the harbour, confers upon them the power of levying certain tolls. The words

in the 5th section, "*drawing more than five feet of water*," are not intended to be descriptive of a class of vessels usually drawing five feet of water, but to furnish a statutable guage of the capacity of the harbour; and unless that capacity exists in point of fact, the vessel is not to be liable to toll. The phraseology of the 5th section is peculiar throughout, pointing to the time when the vessel is entering the harbour, in order to compel the plaintiffs to improve the harbour and to secure a depth of water upon the bar, exceeding five feet. If the Legislature had intended to designate a particular class of vessels, the words used in the Act would have been "*every vessel of five feet draught of water*;" or "*of so much burden or tonnage*," and not "*every vessel entering the harbour, drawing more than five feet*." This is conclusively proved by the subsequent clause of the 5th section, which imposes a toll upon canal boats, *according to their burden or tonnage*, and also by the 6th section, which provides that, in the event of a grant of public money being made to the plaintiffs, the toll is to be diminished according to *tonnage*; showing, that when a particular class of vessels was intended, the intention was clearly expressed. There is no such thing as a merchant vessel's "*ordinary draught of water*," it must vary as the vessel is empty, full, half full, or partly laden. Can it be contended that, if the plaintiffs have left the harbour in such a state that a vessel must tranship her cargo into lighters outside the harbour, in order that the vessel may be able to enter, yet, notwithstanding this dereliction of duty on the part of the plaintiffs, they are to be entitled to levy the toll? The true construction of the statute is, that the drawing five feet of water, at the time when the vessel is entering the harbour, is a test of liability imposed by the Legislature; and unless the state of the harbour is such that a vessel drawing that depth of water can enter the harbour, the toll is not payable.

Next, upon authority, the defendant is not liable to this toll. The 5th section of this Act is, at least, open to two constructions; and the rule in such cases is laid down by Lord Tenterden, C.J., in the *Stourbridge Canal Company v. Wheeley (a)*: "The canal having

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T. T. 1858. "been made under the provisions of an Act of Parliament, the
Queen's Bench "rights of the plaintiffs are derived entirely from that Act. This,
HIBERNIAN "like many other cases, is a bargain between a company of adven-
MINE CO. "turers and the public, the terms of which are expressed in the
v. "statute; and the rule of construction in all such cases is now fully
TUKE. "established to be this—that any ambiguity in the terms of the
"contract must operate against the adventurers and in favour of the
"public; and the plaintiffs can claim nothing which is not *clearly*
"given to them by the Act. This rule is laid down in distinct
"terms by the Court, in the case of *The Hull Dock Company*
"v. *La Marche* (a), where some previous authorities are cited; and
"it was also acted upon in the case of *The Leeds and Liverpool*
Canal Company v. Hustler (b). Adopting this rule, we are to
"decide whether a right to demand some compensation for the use
"of this part of the canal is *clearly and unambiguously* given
"to the plaintiffs by this Act of Parliament, and we think it is
"not."—[LEFRAY, C. J. We may consider it as settled, that where
an Act of Parliament is of doubtful construction, the burden is not
to be thrown upon the public.—CRAMPTON, J. The difficulty is, how
can the toll be levied with certainty, if your construction be the true
one?—In *The Dock Company at Kingston-upon-Hull v. Browne* (c),
the words "*The port of Kingston-upon-Hull*" received two different
constructions, for the purpose of maintaining the principle pervading
all such statutes: namely, that unless the right to take the toll is
perfectly clear, the person insisting upon the toll cannot levy it. In
The Stockton and Darlington Railway Company v. Barrett (d),
Lord Brougham says:—"It must be observed that, *in dubio*, you
"are always to lean against the construction which imposes a
"burden on the subject. The meaning of the Legislature to tax
"him must be clear;" and referring to *Gildart v. Gladstone* (e), he
says:—"The Court there said in effect, here is a Company which
"gets an Act of Parliament to tax the subject; it is incumbent

(a) 8 B. & C. 51.

(b) 1 B. & C. 424.

(c) 2 B. & Ad. 43.

(d) 11 Cl. & Fin. 590, 607; S. C., 3 Scott, N. S., 803.

(e) 11 East, 675; S. C., 12 East, 439; 2 Taunt. 97.

"upon that Company to do two things: to take care that the Act of Parliament is made clear and undoubtful, especially upon those clauses by which the Company seeks to impose a burden upon the public; and if Companies do not choose to take the trouble to do that, let them abide by the consequences, they will not be able to levy the duty."

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The following cases were also cited on behalf of the defendant:—
Hall v. Grantham Canal Company (a), and *Hollingshead v. The Leeds and Liverpool Canal Company (b)*.

Piers White, in reply.

If the plaintiffs have neglected their duty in making and maintaining this harbour, they may be compelled by mandamus to perform it; but even if there were such neglect of duty upon their part, that is not an answer to this action.

LEFFROY, C. J.

There can be no doubt as to the general principle which governs the construction of an Act of Parliament imposing a duty or toll upon the subjects of the realm, when it is equally capable of one of two constructions, namely, that it is to be construed so as to relieve, and not so as to impose a burden upon the subject; but, if of the two constructions the one is a reasonable construction, which will give effect to the Act, while the other is a strained construction, which would not only render it difficult, but, in many cases, even impossible to give effect to the Act, then I apprehend the authorities which have been cited as showing how ambiguously worded statutes are to be construed will not apply. The question in the present case is, whether the Legislature meant to impose a toll or duty upon a class of vessels of a particular draught of water, which should enter the harbour of Arklow? Two things are plainly necessary to the imposition of this toll: first, unless the vessel enters the harbour she is not liable, because the Act* does not impose this toll upon every ship which navigates the sea, but only upon those which enter this

(a) 13 M. & W. 114.

(b) 2 B & Ald. 66.

* 32 G. 3, c. 24 (*Ir.*).

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harbour ; and secondly, unless the vessel draws more than five feet of water, she is not liable to the toll. Then arises the question, how is the vessel's liability to be ascertained, and which of the constructions which have been proposed is most calculated to give effect to the Act ? Admitting the object of the Act to be precisely what is contended for by the Counsel for the defendant, namely, that the toll or duty was conferred upon the Company, not only to encourage but also to enable them to benefit this harbour in every way, by opening and facilitating the entrance to it, still the toll is not granted to the Company *when they shall have opened the harbour*, but, in order to enable them to do so ; and if there were any difficulty as to the precise time when the Company became entitled to this toll, the terms of the 5th section of the Act put it beyond the possibility of doubt, because that section is in these words :—“ It shall and “ may be lawful to and for the said Company and their successors, “ from time to time, and at all times hereafter ” (that is, at all times after the passing of the Act), “ to ask, demand, receive and sue for, “ to the use of the said Company and their successors, the several “ rates and duties hereinafter mentioned.” The right of the Company to toll does not arise for the first time when they have put the harbour into a proper condition to admit vessels of a particular description ; but from the moment when the Act passed which incorporated the Company, they were invested with certain powers, duties, privileges and obligations, mentioned in the Act ; and, amongst other things, a duty is thereby imposed upon them of opening and improving the harbour of Arklow, and they are invested with power to levy certain tolls for the purposes of the Act. Now, as to the mode of levying these tolls, only two methods can be suggested—the one, by taking the ship's draught of water when she has arrived in the harbour—the other, by taking her draught at the moment when she is entering the harbour. The former is a determinate thing, clearly ascertainable by examining the ship when she arrives in the harbour, and putting it beyond all doubt whether the ship is liable or not, supposing the Legislature to have intended to make the liability to toll to depend upon the ship's ordinary and general draught of water ; but if, on the

other hand, the Legislature intended the liability to toll to depend, as has been contended for, upon the particular draught of the ship at the moment when she is entering the harbour, I should like to know how would it be possible to confer upon the Company any substantial benefit whatever, by imposing upon them the duty of watching every vessel at that precise moment? If they sue for the toll, they must aver that, at the precise moment when she entered the harbour, the ship drew that particular depth of water, namely, more than five feet; and no matter what the weather was, whether the ship entered the harbour in storm or calm, by night or by day, that averment must be made and proved. Now is that the sort of toll by which a fund could be provided for carrying into effect the objects of this Act of Parliament, which undoubtedly was to improve this harbour? We cannot say whether a greater or less sum has been expended upon such improvements; some improvements are admitted to have been made; but, whether made or not, this cannot affect the construction of the Act. The rational construction is this, that the Act shall be so construed as to yield to the Company a fund and a means which, through the medium of this toll, will enable them to carry out the objects of the Act. How then could that be managed, if the toll is leviable only upon showing the precise quantity of water drawn by a ship when entering the harbour? The grant of a toll to be levied under such circumstances must of necessity be a nugatory and delusive toll. There is then no ambiguity in the construction of this Act of Parliament; the one construction is natural and reasonable; the other is nugatory and absurd. We cannot therefore entertain any doubt whatever but that the Legislature, by the words, "for every ship or other vessel entering the said port or harbour, drawing more than five feet of water," meant the ordinary draught of water of such ship or vessel, a thing which can be readily ascertained, and did not mean merely her draught at the moment when entering the harbour.

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CHAMPTON, J.

I am entirely of the same opinion with my LORD CHIEF JUSTICE.
I think the construction of this Act, which is contended for by the
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defendant, would be rather calculated to defeat than to carry out its purposes. It appears to be also an ungrammatical construction, and one which would render the levying of the tolls actually impracticable. Was it intended by the 5th section of the Act that there should be a toll leviable upon a *class* of vessels? or was it intended that there should be a species of test applicable to each individual case—a test which would at different times produce different results, with respect to the same individual vessel? I apprehend that there can be no difficulty in ascertaining whether a vessel draws a certain quantity of water. The draught of water of a ship is, I believe, usually inscribed in figures upon the stem or stern-post of the vessel; and the class of vessels contemplated by this section is that class whose draught of water exceeds five feet. A ship's draught of water is the depth of water which she draws in her ordinary trim, and when her ordinary cargo is on board. But see what would be the result if we adopted the construction of this statute which has been suggested by the Counsel for the defendant. Taking the construction which I have mentioned, the Act is quite intelligible; immediately therefore upon a ship coming into the harbour, her draught of water, if she be a vessel of any size, may be known without any measurement or inquiry beyond the marks inscribed upon her stem or stern-post. But if, upon every occasion when the vessel enters the harbour, a question is to be raised as to her particular draught of water at the moment of her entry, how is it to be ascertained? There must be a constant change in the particular draught; sometimes there will be more, and sometimes less water upon the bar. If there be a high wind, the depth of water upon the bar will be affected by it; and how, under all these circumstances, is the test to be applied? Are officers to be continually upon the watch for the moment when a vessel enters the harbour? Are they then to ascertain the measurement? How can they do so? and, if they are unable to do so, is it to be left to the party in charge of the vessel to do it? I agree therefore that the case is very plain. Counsel have pressed very strongly upon the Court the principles of construction which should govern Courts of Law in determining cases of construction of doubtful statutes. It has been

said that the Court should incline in favour of the subject; but, before such a rule of construction can be applied, the doubt must exist; and I do not think that it does exist in this case. We are not called upon therefore to derogate from the true construction of the statute, in order to relieve parties from this toll.

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O'BRIEN, J.

I at first thought the case very clear; and, upon the whole of the case, I adhere to my former opinion, and think that the construction of the Act which has been contended for by the plaintiffs' Counsel is the right construction; although at one time, after I had heard Mr. Walsh's argument, I entertained some doubt upon the point. However, as the question is one of very general importance, I think the parties should be allowed to appeal.

Cause allowed, and liberty to appeal granted.

THE QUEEN,

At the prosecution of the Commissioners for Administering the
 Laws for the Relief of the Poor in Ireland,

v.

The GUARDIANS of the POOR of the BANTRY UNION.*

June 9.

MANDAMUS.—It appeared by the affidavits that, by order of the Poor-law Commissioners, pursuant to the provisions of 14 & 15 Vic., c. 68, dated the 10th of February 1852, it was declared that

Under the 14 and 15 Vic., c. 68, s. 8 (the Medical Charities Act), it is the duty of

the Poor-law Guardians to determine and disburse the salaries of the medical officers appointed by the committee of management, the Poor-law Commissioners having power from time to time to regulate the amount of such salaries. Therefore, where the Poor-law Guardians of the B. Union refused to increase the salary of the medical officer of the dispensary district of the Union, pursuant to an order under the seal of the Poor-law Commissioners, founded upon a resolution of the committee of management, a mandamus was granted to enforce such order.

Under the 14 & 15 Vic., c. 68, s. 8, it is the duty of the Guardians to fix and disburse, subject to the power of the Poor-law Commissioners to raise or lower, the salaries of the medical officers of the Union.

* Coram CRAMPTON and O'BRIEN, JJ.

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UNION.** the Bantry Union should consist of three dispensary districts, of which Bantry was one, and that one duly qualified medical officer should be appointed for each district, and that the cost of all medical relief, and the salaries and charges incidental thereto, should be charged upon the poor-rates of the electoral divisions comprised in such district. That, pursuant to such order, on the 11th of February 1852, a committee of management of the dispensaries of the Bantry Union was elected, and a medical officer appointed for the Bantry dispensary district. That, at a meeting of the committee of management, on the 2nd of June 1857, it was unanimously resolved that the salary of the medical officer should be increased from £60 to £75 a-year. That the resolution of the committee of management having been brought before the Board of Guardians on the 1st of July 1857, was rejected, by a majority of two. That, on the 2nd of October 1857, the Poor-law Commissioners addressed a letter to the Board of Guardians, accompanied by a copy of the resolution of the committee of management, requesting them to take the subject again into their consideration, and apprising the Board that the then salary was below the average salaries of dispensary medical officers in Ireland. That, upon the 4th of November 1857, a motion for the increase of the medical officer's salary was again negatived, by a majority of two. That, upon the 24th of November 1857, the Poor-law Commissioners, having again ineffectually applied to the Board of Guardians to re-consider their former resolution, addressed a letter to them, directing their attention to s. 8* of the Medical

NOTE.—This section is as follows :—"The Guardians of the Union shall, as soon after receipt of the said order as conveniently may be, provide a house, building, room or rooms, to be used as a dispensary or office for the medical officer of each such district, and for the meetings of the committee of management; and shall provide such medicines and medical appliances as may be necessary for the medical relief of the poor in the said district; and the committee of management shall appoint, from time to time, subject to the approval of the said Commissioners, one or more medical officers for the said district, with such qualifications as the said Commissioners shall determine, *and with such salaries as the Guardians, subject to the approval of the said Commissioners, shall determine; and the said Commissioners may, and they are hereby empowered, when they may see occasion, from time to time, to regulate the amount of salaries or allowances payable to such officers respectively, and the time and mode of payment thereof;* and it shall be lawful for the said Commissioners to remove any such medical officer, on sufficient grounds, and to direct the said committee of management to appoint

Charities Act (14 & 15 Vic., c. 68), stating that they had, in pursuance of the powers vested in them by that section, given instructions for the preparation and issue of an order under their seal for increasing the salary of the medical officer of the Bantry dispensary district to £70 per annum. That accordingly, on the 1st of December 1857, an order was issued under the seal of the Poor-law Commissioners, whereby, after reciting that the Guardians of the Bantry Union had determined that the salary of the medical officer of the Bantry dispensary district should be £60 per annum, and had declined to increase it, and that the Commissioners saw occasion to regulate the amount of salary payable to the said medical officer, in exercise of their power and authority under the provisions of the said Act, the Commissioners did thereby fix the salary of the medical officer of the said dispensary district of Bantry at the rate of £70 per annum, until they might by order further regulate the said salary. That the Board of Guardians refused to pay the salary at the increased rate.

E. Pennefather, on the 4th of May 1858, having obtained a conditional order for a mandamus to the defendants, requiring them to comply with the order of the plaintiffs, of the 1st of December 1857—

R. J. Lane (with him *R. R. Warren*) now showed cause.

The question here arises upon the construction of s. 8 of the 14 & 15 Vic., c. 68, by which the salaries of the medical officers appointed under the Act are determined. It is the Guardians alone who have the power to fix the amount of the officers' salaries ; the Commissioners have a veto, and have also the power of regulating the time and mode of paying the salaries and such special allowances as may be granted by the Guardians. If the Poor-law Commissioners approve of the amount of a salary as fixed by the Guardians, can they the next day defeat the act of the Guardians, by directing an increase or diminution of that salary ? Further,

another medical officer in his stead ; and, on failure of the said committee to appoint a medical officer of such dispensary district, for one month after the receipt of the direction of the said Commissioners, it shall be lawful for the said Commissioners to appoint such medical officer by an order under their seal."

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T. T. 1858. there is no provision in the 8th section that, if the Guardians refuse to fix the salary of the officer, the Commissioners shall do so. The Legislature therefore did not intend to confer such a power upon the Commissioners.—[CRAMPTON, J. What is the meaning of the terms that the Commissioners "may, from time to time, regulate the amount of the salaries of the officers ?"]—The terms "determine" and "regulate" occurring in this section are not synonymous; the Guardians are to *determine*, the Commissioners to *regulate* the salary. A medical officer may die or be removed at any period of the year during the accrual of the salary; and if the Guardians in such a case as that refuse to fix the amount of salary payable up to the time of his removal or death, then the power of the Commissioners to regulate the amount so payable arises.—[O'BRIEN, J. If your construction of the Act of Parliament be correct, then that would enable the Guardians to put a positive veto upon the appointment of any medical officer, by simply saying that they will only give a salary not approved of by the Commissioners.]—If the construction contended for by the other side be adopted, then, no matter what be the amount of salary fixed by the Guardians, the Commissioners may at any time come in and fix the amount at their discretion. In the case of *The Queen v. The Limerick Union* (*a*), it was held that the Poor-law Commissioners, in directing the Guardians to make remuneration to the medical officers of their Union, in addition to their salaries, had exceeded their jurisdiction.

D. Lynch (with him *E. Pennefather*), contra.

The case of *The Queen v. The Limerick Union* is not like the present, having been decided upon statutes altogether different from that now under discussion, and the remuneration there directed to be made being for services voluntarily performed during the prevalence of a distressing epidemic. Although, doubtless, a large power has been entrusted to the Commissioners by the present Act, yet the Legislature, in conferring it, considered that they were placing it in the hands of persons duly qualified and fit to exercise it.

R. R. Warren replied.

CRAMPTON, J.

We have no difficulty whatever, as to the construction to be put upon this 8th section of the Act of Parliament,* upon which the question now before us entirely depends. The legislation upon this subject is as follows:—The dispensary committee, some of whom are also Poor-law Guardians, are to elect a medical officer, subject however to the approval of the Commissioners; so that no medical officer when elected can act, except he be approved of by the Commissioners. I should also say, if the Commissioners should exercise their power of removing any medical officer whom the committee of management had appointed, and should direct the committee to appoint another medical officer in his stead, and that the committee should refuse to do so, this Court, upon the application of the Commissioners, could compel them to proceed to such election. Well then, the medical officer having been elected by the committee of management, his salary is to be fixed by the Guardians of the Union, subject to the approval of the Commissioners. What does that mean? Why this, that there can be no salary allotted to the medical officer unless it be approved of by the Commissioners. If then the Commissioners do not approve of the salary fixed by the Guardians, what is to be done? Is the whole business of the Union to come to a stand-still, in consequence of this difference of opinion between the Guardians and the Commissioners? No; the Guardians must fix a salary, to be approved of by the Commissioners; and if they do not, this Court, upon the application of the Commissioners, will compel them to do so. In the present case, the medical officer appointed must, without doubt, have been one who was approved of in the first instance, inasmuch as from 1852 to 1857 he continued to discharge the duties of his office, and was paid during that period for the same. The committee of management now think that his salary should be increased; this the Guardians refuse to do; and, as we are bound to put a rational construction upon all the terms of the Act, we do so by holding that it is the duty of the Guardians to fix and disburse the salaries of the medical officers, subject, however, to the approval of the Commissioners, who by the Act are “empowered, when they may see occasion, from time

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"to time to regulate the amount of salaries or allowances payable to such officers respectively."* Now, do not these words give a jurisdiction of some kind or other to the Commissioners? There is something here which the Commissioners must do from time to time; they are to regulate the amount of the officers' salaries from time to time. Now, what is the explanation of these terms? It is to be observed that the word "regulate," which is a very strong word, is alone used in prescribing the duty of the Commissioners; the word "determine" is not employed with reference to them, because the Commissioners are not the persons, properly speaking, to "determine" the amount of the salaries; their power is a different one; it is, from time to time, when they may see occasion, to "regulate" the amount of the salary. Does not this plainly import that, if the Commissioners think it necessary, they may raise or lower the salaries, from time to time? and how can they do this, except by an order directed to the Guardians for that purpose? In the present case, the Commissioners, upon the recommendation of the committee of management, have thought proper to raise the salary of the medical officer from £60 to £70 a-year; they accordingly submit this suggestion to the Guardians for their consideration; the Guardians resolve not to adopt the suggestion; the Commissioners call upon them to re-consider their resolution, but the Guardians still persist in refusing altogether to increase the salary. When we come, therefore, to consider these important words of the Act of Parliament, "to regulate, from time to time, the amount of salaries or allowances payable to such officers respectively," I take it that the "salaries and allowances" here mentioned are the permanent, the annual "salaries and allowances" of the officers, the "allowances" being additional payments, which, under certain circumstances, the medical officers are to receive. The case put by Mr. *Lane* cannot be sustained, because it is the duty of the Commissioners to regulate the amount of salaries, not to distribute them between particular officers, or to apportion them in the event of a vacancy occurring in the middle of the year. The Act of Parliament contemplates no such thing; the clear meaning of it is, that if the Guardians refuse to do what the

* 14 & 15 Vic., c. 68, s. 8.

Commissioners from time to time think right, with respect to the salaries of the medical officers, then the Act gives the Commissioners authority to regulate their amount. The case of *The Queen v. The Limerick Union* (a), cited as ruling this case, has no bearing directly or indirectly upon it. In my opinion, that case was properly decided. It was not a case in which the Commissioners were called upon to regulate the amount of the salary to be paid to the officer, but, where they took upon themselves to order payment to be made out of the general funds of the Union, upon their own admeasurement of the value of services of an extraordinary character, as a compensation not authorised by any Act of Parliament, to certain medical officers who had voluntarily taken upon themselves to discharge very serious and important duties. That case is not at all applicable to the present case. I am, therefore, quite satisfied that it is impossible to put any rational construction upon this 8th section of the Act, except that which has been put upon it by the Commissioners; it is the only one which can possibly be adopted; and, as my Brother O'BRIEN concurs with me in my interpretation of the Act, the conditional order must be made absolute, with costs.

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O'BRIEN, J., concurred.

Order for a mandamus absolute.

(a) 4 Ir. Com. Law Rep. 636.

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Estate Chamber.*

J. M. GREEN, *Appellant*; JOHN JONES, *Respondent*.

Appeal from the Queen's Bench.

(19 & 20 Vic. c. 102, ss. 41 *et seq.*)

Nov. 6.

A charter-party, un-stamped when signed at Cork in July 1855, was, within nine days from that date, sent to a person in London to be stamped; in 1856 it was in the plaintiff's possession, stamped with a 2s. 6d. stamp, but, in 1858, it was produced, stamped with a 5s. stamp, and received in evidence (subject to objection) in an action to recover freight thereby secured.—*Held,*

affirming the order of the Queen's Bench, that the charter-party was rightly received in evidence.

Held also, that the presumption was, that the charter-party had been brought in due time to the Stamp-office to be stamped.

The requisitions of the 5 & 6 Vic., c. 82, s. 34, are complied with, if a charter-party, unstamped when executed, is brought to the officer at the Stamp-office, with the duty, within fourteen days from its execution, or with the duty and penalty, after such period of fourteen days, but within one calendar month from its execution, and it thereupon becomes the duty of the officer duly to stamp the charter-party; and if the Act has been thus complied with, the validity of the charter-party is not affected, although, in fact, it be not stamped within such period of fourteen days or one month.

* Coram MONAHAN, C. J., PICOT, C. B., BALL and CHRISTIAN, JJ.

PENNEFATHER, RICHARDS and GREENE, BB.

† CRAMPTON, J., *in Banco, solus*, 16th November 1857.

"Cork, 25th July 1855.

"**GREEN, BROTHERS,** Anderson's Quay.

"I hereby agree to proceed with my vessel, the Josephine, to "Aberayon, with all possible despatch, and there deliver my cargo "of barley from Holbeck, on being paid freight at the rate of eighteen "pence per imperial quarter, with one guinea gratuity, in addition "to my freight, as per charter-party from Holbeck to Cork.

"Yours respectfully,

"**JOHN JONES,** Master of the Josephine.

"We accept the above.—**GREEN, BROTHERS.**

"Witness—**JOHN M. GREEN.**"

This document was then placed in a copying machine, and the copy which was thus made was signed by the defendant and given to the plaintiff, and upon the trial was produced, with a 5s. stamp impressed upon it. Upon cross-examination, the plaintiff stated that this charter-party, so signed by the defendant, was not stamped at the time of its execution, but that, within about nine days after its execution, the plaintiff sent it to a person in London, named Williams, for the purpose of having it stamped, and that, in July 1856, it was returned to the plaintiff, having a 2s. 6d. stamp impressed upon it. The charter-party was then offered in evidence on behalf of the plaintiff, and objected to on the part of the defendant, as not duly stamped; but having been read, subject to objection, the learned Judge directed a verdict for the plaintiff, reserving leave to have the same changed into a nonsuit, if the charter-party ought not to have been received in evidence.

The points noted for argument on the appeal were:—First. That the charter-party was not admissible in evidence, inasmuch as it was not stamped with the proper stamp until after the expiration of one month from its execution, after which period the Commissioners of Stamps are prohibited from stamping a charter-party, by the 5 & 6 Vic., c. 82, s. 34.

Second. That there was no evidence that the charter party had been brought to the Stamp-office to be stamped, within one month from its execution.

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M. T. 1858. *D. Lynch and W. A. Exham* (with them *Chatterton*), for the
Exch. Cham. appellant (the defendant below).

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The 5 & 6 Vic., c. 82, s. 34, is similar to the English Act of the same year, c. 79, s. 21, and it provides that a charter-party shall not be stamped after having been signed, except in one of two events; either within fourteen days from its date and execution, upon payment of the duty, or after the fourteen days, and within one month from its date and execution, upon payment of the duty and penalty: after the month has elapsed it cannot be stamped at all. In the present case, the charter-party was not stamped when it was signed; in 1856 it appears without being properly stamped, and it is not until the trial, in 1858, that it is produced with a sufficient stamp; by no possibility, therefore, could it have been stamped within one month from its date.—[MONAHAN, C. J. Your argument proceeds upon the assumption that the statute required the charter-party to be *stamped* within the month, but there is nothing in the statute to warrant that inference. The Act requires that the instrument "*shall be brought*," within a limited period, to the proper officer, whose duty it then becomes to affix to it the proper stamp; and we must presume, from the fact of its being stamped in 1856, that it was brought to the Stamp-office in proper time].—They cited *The Londonderry Steam Packet Company v. Middleton* (a); *Green v. Davies* (b); and *Closmadelac v. Carréll* (c).*

J. Clarke (with him E. Sullivan and M. Harrison), for the respondent (the plaintiff below), was not called upon by the Court.

(a) 7 Ir. Com. Law Rep. 361.

(b) 4 B. & C. 235.

(c) 18 C. B. 36; S. C. 2 Jur., N. S., 474; 25 L. J., C. P., 216.

* In addition to the cases above referred to, the following cases were cited in the Court below. For the defendant below, *Rex v. Inhabitants of Preston* (5 B. & Ad. 1028); *Rose v. Tomlinson* (3 Dow. P. C. 49); *Butts v. Swan* (2 Br. & B. 78.)

For the plaintiff below, *Rex v. Whiston* (4 Ad. & El. 607, 611).

MONAHAN, C. J.

In this case we do not think it necessary to call upon the Counsel for the respondent. The document upon which the question turns was produced upon the trial at Cork with the proper stamp impressed upon it. It is not necessary for us to consider whether any inquiry should have been gone into at the trial, as to the circumstances under which the stamp was affixed. It appears from the evidence that the document in question is a charter-party, and that it was not stamped at the time of its execution; but it also appears that, within nine days after its execution, it was sent by Jones, the respondent, to a person in London, for the purpose of having it stamped, and that, in the early part of the year 1856, it was in Jones' possession, stamped with only a 2s. 6d. stamp; subsequently, however, a 5s. stamp is impressed upon it, either in addition to or over the previous stamp. All this evidence is consistent with the fact that the charter-party was brought in due time to the proper officer, to be stamped, and that rendered it the duty of the officer to stamp it with the proper stamp. The Act of 5 & 6 Vic., c. 82, s. 34, provides that a charter-party shall not be stamped after its execution; provided, however, that if such charter-party shall be brought to the proper officer to be stamped, within fourteen days from its execution, it may be stamped, without payment of any penalty; and if brought after the fourteen days, and within one month, it is the duty of the Commissioners to stamp it, on payment of the duty, and a penalty of £10. Now all the presumption in the present case, and all the inference deducible from the facts in evidence is, that this charter-party was brought within fourteen days to the Stamp-office to be stamped, and the Act contains no provision by which the officer is prevented from affixing the stamp at a subsequent period, provided the instrument is brought to the office, for the purpose of being stamped, within the periods limited by the statute. We are, therefore, all of opinion, that the decision of the Court of Queen's Bench was quite right, and we affirm their order, with costs.

PIGOR, C. B., BALL and CHRISTIAN, JJ., and PENNEFATHER,
RICHARDS and GREENE, BB., concurred.

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M'GOWAN v. SEDLEY.*

Nov. 6.

(*Error from the Court of Queen's Bench.*)

Upon the election of a Member of Parliament, the plaintiff's vote, having been objected to, was rejected by the Returning-officer's deputy, as being the vote of a paid agent of the candidate for whom it was tendered, and a note to that effect was entered by the deputy in the poll-book.—*Held*, that this substantially amounted to a recording of the vote by the deputy, whereby it became the duty of the Returning-officer, on the inspection of the poll-book, to cast up the votes recorded for the same candidate; and for breach of which duty, the Returning-officer was liable in an action.

Quare.—What would have been the duty of the Returning-officer, if the deputy had not recorded the vote at all, or had recorded it for a candidate other than the one for whom it was tendered?

A deputy has not authority to inquire into any objection to a vote tendered to him, except by putting to the voter the two questions set forth in the 13 & 14 Vic., c. 69, s. 88.

Upon a trial at Nisi Prius, Counsel for the defendant objected to evidence tendered by the plaintiff; the Judge admitted the evidence, but took a note of the objection. Exceptions were taken, on the part of the defendant, to other rulings of the Judge upon the trial, but not to the admission of this evidence.—*Held*, that the objection must be considered as abandoned.

* *Coram MONAHAN, C. J., PIGOT, C. B., BALL and CHRISTIAN, JJ., and PENNEFATHER, RICHARDS and GREENE, B.B.*

figures following ; that is to say, " Vote objected to as paid agent of Mr. Wynne, tendered his vote ; " and which entry in the said space or column indicates and signifies, and the plaintiff avers that the said entry did indicate and signify, that the plaintiff was not entitled to give his vote at the said election for choosing a burgess, &c., as being and acting as a paid agent at the said election for the said J. A. Wynne, &c.

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This averment was not traversed by the defence.

It also appeared, by the evidence of the conducting agent of J. A. Wynne, that Patrick Pyne was numbered 297 on the register of votes for the said borough, and that he did not appear or tender his vote at all, unless he did so when witness was absent.* Counsel for the defendant having objected to this evidence concerning Patrick Pyne, as illegal, and Counsel for the plaintiff having insisted on its admission, the learned Lord Chief Justice admitted the evidence, but took a note of the objection. Neither of the exceptions which were taken on behalf of the defendant comprised any reference to the evidence relating to Patrick Pyne, which had been thus objected to.

Judgment having been given for the plaintiff in the Court below, the defendant alleged error in the Exchequer Chamber. The plaintiff denied the allegation.

* It was admitted on the cross-examination of one of the defendant's witnesses, that this Patrick Pyne did not vote at the election ; but his vote was, nevertheless, recorded for P. Somers.

NOTE.—The following points were noted for argument on the part of the plaintiff in error :—

First.—That the plaint does not disclose any cause of action good in substance against the defendant, or good in law, or whereon a judgment ought to be given against the defendant ; and that the judgment ought to be reversed.

Second.—That all the issues directed to be tried were immaterial issues, and that, notwithstanding said issues, and the verdict of the jury found upon them, the judgment for the plaintiff ought to be arrested.

Third.—That no such duty of deciding that the vote of the plaintiff had been improperly rejected by Joseph Foley the deputy, as in the plaint alleged, was by law cast upon the defendant as Returning-officer of the borough of Sligo ; and that the alleged breach of duty did not constitute a legal ground of action against the defendant.

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G. Fitzgibbon and *Harkan*, for the plaintiff in error (the defendant below), in addition to the argument in the Court below,* contended that the Returning-officer had no authority, under the 13 & 14 Vic., c. 68, to review the decision of his deputy, and that such a construction of the Act would be unreasonable; because, in a large county, as, for instance, the county of Cork, where the polling booths must necessarily be at great distances from each other, it would be impossible for the Returning-officer to attend personally at the different booths during the two days limited for the polling; and that if the subject-matter to which an Act applies be such as to make a given construction of its clauses impossible or irrational, the Court must have regard to such subject-matter as bearing upon the construction of the Act: *Salkeld v. Johnston* (a).

(a) 1 Hare, 196, 210.

* 7 Ir. Com. Law Rep. 430.

Fourth.—That the defendant having, as stated in the plaint, duly appointed, instructed and sworn the said Joseph Foley, as by law required, faithfully to discharge his duty as deputy, the defendant had no power or jurisdiction to decide that the vote of the plaintiff had been improperly rejected by the said Joseph Foley, as in the said plaint alleged.

Fifth.—That it is by the plaint averred that the said Joseph Foley, having been duly appointed, sworn and instructed as the deputy of the defendant, procured an entry to be made opposite to the name of the plaintiff, in the poll-book provided for the booth in which said Joseph Foley was appointed to act, and did act as such deputy at said election; which entry signified and indicated that the plaintiff was not entitled to give his vote at the said election, as in the plaint alleged, and to have his vote cast up amongst the number of votes as they should appear on the poll-books after the final close of the poll at the said election, as having been given and allowed for choosing the said J. A. Wynne a burgess to serve in Parliament for the said borough of Sligo; and that it was the duty of the defendant, after the final close of the poll, and at the time in that behalf appointed by the statute in that case provided, to reckon up the votes as they appeared in said book, and not in any other way, and without altering, or suffering to be altered, any entry of any vote, as the same had been made by said deputy: and that, in not reckoning up the vote of the plaintiff, as in the plaint alleged, the defendant duly performed his duty, and that, for so doing, no action can be sustained against him.

Sixth.—That there was no evidence to prove that the defendant rejected the plaintiff's vote, as in the plaint alleged.

Seventh.—That the Lord Chief Justice should have withdrawn from the jury the evidence touching the several persons named in the second exception.

Eighth.—That the exceptions ought to have been allowed.

They also contended that it was open to them to argue the objection to the evidence concerning Patrick Pyne, inasmuch as it appeared upon the record, although it was not specifically made the subject of exception : *Ball v. Mannin* (a); *Lessee of Lord Trimleston v. Kemmis* (b).—[BALL, J. The case of *Lord Trimleston v. Kemmis* has been overruled by the House of Lords (c). The powers of a Court of Error to adjudicate on the record and bill of exceptions are the same in this country as in England.—PENNEFATHER, B. If the evidence was not excepted to, we must take it that the objection was abandoned.]

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Macdonogh (with him *Shekleton*), for the defendant in error (the plaintiff below), was not called on by the Court.

MONAHAN, C. J.

We do not feel it necessary, in this case, to call upon the Counsel for the defendant in error. We are quite clear upon the point which has been argued, that it was the duty of the plaintiff in error, he being the Returning-officer for the borough of Sligo, to record or reckon the vote of the plaintiff below, who is the defendant in error here. It is conceded that, under the 13 & 14 Vic., c. 69, the deputy appointed by the Returning-officer has no authority to inquire into any objection which may be made to a vote which is tendered to him; but as to the particular vote in question, the case stands thus: an entry appears upon the face of the poll-book, and the proper meaning of that entry is alleged to be, and not traversed, that Sedley, the defendant in error, tendered his vote for Mr. Wynne, who was one of the candidates for the election at the borough of Sligo; that an objection was made to the vote, as being that of a paid agent of Mr. Wynne, and that the vote was not recorded for either of the candidates. In this state of things, we are all clearly of opinion that it was the duty of the plaintiff in error, Mr. M'Gowan, on the inspection of the poll-book itself, to reckon the vote of Sedley, the defendant in error, for Mr. Wynne; it appearing,

(a) 1 D. & Cl. 380.

(b) 1 J. & Sy. 587.

(c) *Roe v. Kemmis* (9 Cl. & Fin. 749).

M. T. 1858. therefore, that he had tendered his vote for him, and that the vote
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SEDLEY. had been improperly omitted to be reckoned by the deputy. This being so, it is wholly unnecessary for us to consider what would have been the duty of the Returning-officer in either of the cases which have been suggested, namely, if the deputy had not recorded the vote at all, or had reccorded it for a candidate other than the one for whom it had been tendered. We decide that, in this case, there was a substantial recording of the vote by the deputy, and which the Returning-officer should have considered as such. That disposes of the principal question in the case.

As to the other question which has been argued before us, the facts appear to be thus: some evidence was given at the trial—whether it was properly received or not has not been argued here—an objection was made to the evidence, and a note taken of the objection by the Lord Chief Justice, who tried the case, and nothing further was done about it. Exceptions were afterwards taken to the ruling of the Lord Chief Justice; but no exception was taken to the admission of the particular evidence in question, and we can only treat it now as an objection taken, but not pressed to an exception, and which we must, therefore, consider as abandoned.

PIGOT, C. B., BALL and CHRISTIAN, JJ., and PENNEFATHER,
RICHARDS and GREENE, BB., concurred.

Judgment affirmed.

NOTE.—A paid agent is now entitled to vote; the 7 & 8 G. 4, c. 37, by which he was disqualified, having been repealed by the 17 & 18 Vic., c. 102, schedule A.

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 SMYTHE and JOHN OWENS

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WILLIAM ORR.

WILLIAM ORR

v.

JOHN STEWART MOORE, THE REV. JOHN HENRY
 SMYTHE and JOHN OWENS.

(*Error from the Court of Queen's Bench.*)

Nov. 8.

THIS case came before the Court below, upon a special case stated by consent for the opinion of the Court, subject to an agreement that error might be brought upon the judgment of the Court. The case stated is fully set out in the report of the case below (*a*), where, however, for the words "waste thereby incurred" in the marginal note, read "waste occasioned by such mining and quarrying." The judgment of the Court of Queen's Bench upon the questions submitted by the special case was, that W. Orr (the

By indenture in 1724, A demised arable land, pasture and bog to B, for three lives renewable for ever, excepting out of the demise "all mines, minerals, coals and quarries of marble, freestone and slate, and all

other royalties whatsoever." In the indenture B covenanted as follows:—"That it shall be lawful for A, his heirs and assigns, his and their servants, labourers and workmen, with horses and carriages, from time to time, to bore, dig and search for mines, minerals, coals and quarries of marble, freestone and slate in any part of the demised premises, except in houses, gardens, orchards, courts and yards, and to carry away the same, and likewise such turf as A, his heirs and assigns, shall give liberty to cut, make and save, in the mooses or turbary belonging to the said demised premises; A, his heirs and assigns, allowing to B, his heirs and assigns, reasonable amends and satisfaction for the waste, spoil and damage which they shall sustain on account of boring, digging for and carrying away such mines, minerals, coals, marble, freestone and slate."—*Held*, affirming the judgment of the Court of Queen's Bench, that this clause reserved a right to A, his heirs and assigns, by his and their servants, labourers and workmen, to cut such turf, both for sale and consumption, as he and they should give liberty or point out in that behalf.

Held also, that A, his heirs or assigns, could not grant this right to any person, not being his or their assignee, or his or their servant, labourer or workman.

Quare, whether this covenant did not give to A, his heirs and assigns, in addition to the right to cut turf for his and their benefit, the right to authorise their servants, labourers and workmen, to cut turf for their own consumption and benefit?—[*Per CHRISTIAN, J.*]

(*a*) 4 Ir. C. L. Rep. 567.

M. T. 1858. defendant below) was not entitled to grant liberty, permission or authority to Thomas Reid, not being the servant, labourer or workman of W. Orr, to cut and carry away the turf in the special case mentioned ; and, therefore that, upon that portion of the questions submitted, the plaintiffs below should have judgment: but that W. Orr was entitled to grant such liberty, permission or authority to Joseph Sloan and Robert M'Master, being such servants, labourers, or workmen, and therefore that W. Orr should have judgment upon the remainder of the questions so submitted. Upon this judgment so far as it regarded Sloan and M'Master, the plaintiffs below alleged error in the Exchequer Chamber, and the defendant denied the allegation; and the defendant below, so far as the judgment regarded Reid, also alleged error in the Exchequer Chamber, and the plaintiffs denied the allegation. The cross cases in error now came on to be heard together.

Joy and A. S. Crawford, for the plaintiffs in error in the first, the defendants in error in the second case.

The lease of 1724 expressly demises the bog, and although it excepts out of the demise mines, minerals, coals and quarries, it does not mention bog in the exception. The lease also contains a covenant enabling the reversioner to work the mines and quarries, making compensation to the lessee, and also to cut turf; and this right to cut turf is contended by the plaintiffs in error to be limited to such turf as the reversioner, his heirs and assigns, shall require to cut for his or their own consumption, and which must also be cut by the hands of his servants and labourers. But W. Orr, who represents the reversioner, contends, upon the contrary, and the Court of Queen's Bench has in effect decided, that he is at liberty, through the medium of his servants and labourers, to cut away and sell the whole of the turf from this bog, by which he will destroy the subject-matter of the grant, and that without making any compensation to the lessee, the rent remaining unreduced. If such a right were claimed as a custom it would be void: *Wilson v. Willes* (a), adopted in *The Attorney-General v. Gauntlett* (b); if claimed as an excep-

(a) 7 East, 121.

(b) 3 Y. & J. 83, 100.

tion or reservation of the turf it is void, as being inconsistent with, and repugnant to, the grant and demise of the turf, giving an unlimited right to cut the turf: *Shep. Touch.*, p. 79. If the right be claimed as a re-grant by the lessee to the reversioner, it is void; first, because it would be inconsistent with the grant itself, being by the same deed; and secondly, because it would import that the lessee possessed the absolute interest in the bog, whereas, in fact, he acquired by the demise only a limited interest, and could not, therefore, himself have cut turf for sale, as that would have rendered him liable for waste: *Coppinger v. Gubbins* (*a*); *Jack v. Creed* (*b*); *Massy v. Gubbins* (*c*). This covenant, therefore, can only operate in the ordinary way, and must receive a reasonable construction. Unless the Court import into the covenant after the word "turf," the words "for sale," or "with liberty to sell," the right contended for on the other side cannot be supported. —[*MONAHAN, C. J.* If an express clause had been inserted in this demise (comprising as it does arable land, pasture and bog), that the lessor, his heirs and assigns, should be at liberty to enter and cut and sell the turf, considering the whole deed, what would be the effect of such a clause?]—However expressly framed, it would be void, as destructive of the very subject-matter of the demise to the lessee. A reasonable construction, *subjectam materiem*, must be given to this covenant: *Burrows v. Hayes* (*d*); *Jones v. Reynolds* (*e*); *Brown v. Goldsmith* (*f*). The other side will rely upon *Lord Mountjoy's case* (*g*), but it is distinguishable as being a grant in fee; and even in that case, in the third resolution, it was resolved, that although Lord Mountjoy might put any one person, or any two or more persons into his place, yet he could not assign his interest in different parts of the lands to different persons.

J. E. Walsh and Harrison, for W. Orr, who was the defendant in error in the first, the plaintiff in error in the second case.

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| (<i>a</i>) 9 Ir. Eq. Rep. 304. | (<i>b</i>) 2 H. & B. 128. |
| (<i>c</i>) L. & T. 88. | (<i>d</i>) L. & T. 94, n. |
| (<i>e</i>) 6 N. & M. 441. | (<i>f</i>) Moo. 870. |
| (g) Co. Litt. 164 <i>b</i> ; S. C. 4 Leon. 147; 1 And. 307. | |

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We concede that this is not an exception, strictly speaking. Mines are expressly excepted, because the lessee was to take no interest in them by the demise; while in the bog, the lessee acquired a qualified interest, subject to the right which the reversioner expressly retained to himself, his heirs and assigns. It must be conceded that the reversioner, being owner in fee of the soil, prior to the execution of the demise in 1724, possessed the right which is now contended for; the true construction then of that demise is, that the lessee thereby obtained a right to cut, for his own consumption, and, subject thereto, covenanted not to prevent the lessor from also cutting the turf to the same extent as he was entitled before the demise was made.—[CHRISTIAN, J. By the terms of the lease, the lessor can only cut by the hands of his servants, labourers and workmen].—The reservation of a power to resume nearly the whole subject-matter of the demise is not void: *Croker v. Orpen* (a); *Stukely v. Butler* (b). The special case finds that there was no house upon the lands demised by the lease of 1724, at the time of the execution of that lease; we might, therefore, contend that the lessee is not entitled to cut turf, even for his own consumption: *Luttrell's case* (c). But we do not press the case to that extent; we admit a qualified right in the lessee to cut turf for his own use, subject to the reversioner's right to cut turf generally. It is true that the exercise of these rights may, in process of time, exhaust the bog, but that circumstance is adverted to by the Lord Chancellor (d) in *Coppinger v. Gubbins* (e); and when the turf is removed, the lessee will still be entitled to cultivate and reclaim the soil, which, subject to the right claimed, has been demised to him. This right is not analogous to a custom; but even if it were, it would be valid: *Bateson v. Greene* (f). The real question is, can the reversioner give liberty to any person besides his own servants and workmen to cut the turf? The Court of Queen's Bench held that the reversioner was entitled to cut the turf by means of his labourers and

(a) 9 Ir. Eq. Rep. 563; S. C., 2 J. & Sy. 545; 6 Ir. Law Rep. 351.

(b) Hob. 168.

(c) 4 Rep. 86.

(d) Sir E. Sugden.

(e) 9 Ir. Eq. Rep. 309.

(f) 5 T. R. 411.

servants ; and it is a distinction without a difference, to hold that he may employ Reid to cut turf, and when it is cut, to sell it to him, but that he cannot sell the turf to Reid to cut for himself. This right of the reversioners may be termed a "*privilege*," or "*license of profit*;" *Wickham v. Hawker* (a); or perhaps an "*uncertain inheritance* :" *Co. Litt.* 165 a. The third resolution in *Lord Mountjoy's case*, *Co. Litt.* 164 b, is not elsewhere reported (b).—[CHRISTIAN, J. The covenant seems to be capable of this construction, that the lessor shall be entitled, by himself or any other person, to cut turf for his own purposes, or to sell ; and that, in addition to that right, he may authorise his servants, labourers and workmen, to cut for themselves such turf as he shall point out.]

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Joy, in reply.

The report of *Lord Mountjoy's case*, in *Co. Litt.* 164 b, is substantially borne out by the report in 4 *Leon*.

MONAHAN, C. J.

It is right to mention that some inaccuracy appears in the statement of this case. In the earlier part of it, it is stated that Reid and Sloan cut the turf, the subject of the action, for their own use and benefit, though with the permission and by the authority of Mr. Orr; but in the latter part of the case, it is stated that Sloan cut the turf in question by the directions and for the use of Mr. Orr, by whom it was sold; and it appears to have been decided in the Queen's Bench, and has been argued before us, on this latter supposition. We therefore proceed to dispose of the case, assuming that the turf cut by Sloan and M'Master was cut by them for the use of Mr. Orr, who sold and disposed of it after it was so cut, no part thereof having been cut for his personal consumption; and that the portion cut by Reid, though cut by the permission of Mr. Orr, and in consideration of a small sum of money paid by Reid to him, was in fact cut by Reid for his own use, to be consumed by him in his residence on a portion of the lands which are now the property of Mr. Orr, but which, at the time

(a) 7 M. & W. 63. (b) *Co. Litt.* 165 a, *Butler's note* (!).

M. T. 1858. of the making the lease of the 2nd of November 1724, were the
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property of the lessor in that lease, and, of course, not part of the demised premises. In this state of facts, the Court of Queen's Bench decided that the cutting by Sloan and M'Master was justifiable, and that that by Reid was not justifiable; in other words, that Mr. Orr has an unlimited right to cut turf on the bog in question for his own use, whether for sale or consumption; and that, for that purpose, he may employ not merely his ordinary workmen, servants and labourers, but other persons employed specially for the purpose; but that he has no power to give permission to others, whether tenants of his own or strangers, to cut turf on the bog in question for their own use, whether for consumption or sale. The clause in the lease of the 2nd of November 1724, on which the question depends, is in the following words:—"And the said Charles Johnston doth, for himself, his heirs and assigns, covenant, promise and agree, to and with the said Robert Colville, his heirs and assigns, "that it shall and may be lawful to and for the said Robert Colville, "his heirs and assigns, his and their servants, labourers and workmen, with horses and carriages, from time to time, to bore, dig and "search for mines, minerals, coals, and quarries of marble, freestone "and slate, in any part of the demised premises, except in houses, "gardens, orchards, courts and yards, and to carry away the same, and "likewise such turf as the said Robert Colville, his heirs and assigns, "shall give liberty to cut, make and save in the mosses or turbary "belonging to the demised premises, he, the said Robert Colville, "his heirs and assigns, allowing unto the said Charles Johnston, "his heirs and assigns, reasonable amends and satisfaction for the "waste, spoil and damage which they shall sustain on account of "boring, digging for and carrying away such mines, minerals, coals, "marble, freestone and slates."

It has been argued by the Counsel for the plaintiffs in error, that if the construction put by the Queen's Bench on this clause be the true one, the claim would be void, as being inconsistent with the grant contained in the demise; and that if a demise were made of a farm consisting of arable land and bog, containing an express clause authorising the landlord to cut whatever turf he pleased,

whether for sale or consumption, such clause would be void, as being inconsistent with the grant, as under it the landlord might cut away and consume the entire of the bog; and therefore they argue it would not be valid as an exception, and consequently it is altogether void. We cannot accede to this proposition, as, without stopping to inquire whether such clause would operate as a legal exception, or as the creation of what is called in some of the cases a limited or particular inheritance, we have no doubt that there is nothing illegal or inconsistent in a landlord demising arable land and bog, and reserving to himself such a right, even though the exercise of it may have the effect of consuming all the turbary on the bog in question, in which event the soil of the cut away bog will belong to the tenant as a portion of the demised premises. The rights of the parties, therefore, must depend on the true construction of the clause in question. Omitting from the clause the provision as to mines, minerals, quarries, &c., and confining its operation to the turf, it will read thus:—"That it shall be lawful for the said Robert Colville, his heirs and assigns, his and their servants, labourers and workmen, with horses and carriages, from time to time, to dig, and search for, and carry away, such turf as the said Robert Colville, his heirs and assigns, shall give liberty to cut, make and save, in the mosses or turbary belonging to the demised premises." It cannot be denied that, reading the clause even in this way, it is awkwardly expressed, and that it is no easy matter to give it a construction which will give effect to the several parts of it; but, on the whole, we are of opinion that the intention was, that the lessor, his heirs and assigns, should by his servants and workmen have the right to cut turf; and we think that that intention can best be effected by holding the construction to be, that the lessor, his heirs and assigns, should have the right, by his servants and workmen, to cut such turf as he or they should give liberty, or point out to his servants, so to cut; and, there being nothing in the clause in any way to limit the right of the landlord to cut for his own consumption, or otherwise, that we must hold the right to be unlimited; that is, that Mr. Orr, now representing the landlord, has the right to cut both for sale and consumption, and therefore

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M. T. 1858. that the cutting by Sloan and M'Master was justifiable; and we
Eccles. Chanc. are also of opinion that the right is confined to a cutting by the
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ORR. landlord, his heirs and assigns, and his and their servants and
labourers; and we cannot find anything in the clause enabling the
landlord to give this right or permission to a third person, not
being his assignee, and therefore that the cutting by Reid was not
justifiable. The result, therefore, is that our opinion coincides with
that of the Queen's Bench, as to each of the three cuttings, the
subject of the case, and we therefore affirm their judgment; but, as
each party appealed against that judgment, we do so without costs.
As the question does not arise, Reid not being a labourer or work-
man of Mr. Orr, we give no opinion whether or not, as suggested
during the argument by my Brother CHRISTIAN, Mr. Orr, in
addition to the right to cut turf for his own benefit, may not also
have the right to permit his ordinary workmen and labourers to cut
turf on the moss in question for their own consumption or benefit.

PIGOT, C. B., BALL and CHRISTIAN, JJ., and PENNEFATHER,
RICHARDS and GREENE, BB., concurred.

Judgment affirmed.

M. T. 1857.
Common Pleas.

DEEBLE v. M'MULLEN.

(*Common Pleas.*)

Nov. 3.

THIS was a special case, submitted for the opinion of the Court by the parties to the suit. The action was brought for damages alleged to have been sustained by the plaintiff, by means of the severing and carrying away by the defendant of certain mill-stones and machinery attached to a mill, demised with other premises, by the plaintiff to the defendant; and the substantial question at the trial was, whether the property described in the summons and plaint, or any part of it, was the property of the plaintiff? The case came on for trial before Mr. Justice BALL, at the Cork Spring Assizes for 1857, when a verdict was found for the plaintiff for £30, subject to the opinion of the Court above upon the following facts.—By indenture of lease, bearing date the 9th of December 1730, Edward Finn demised the mill and premises in question, together with the mill-stream and appurtenances, to Thomas Smith and his heirs, for three lives renewable for ever; which lease contained a covenant by Thomas Smith for himself, his heirs and assigns, to repair, maintain, uphold and keep, during the tenancy, the said mill and premises, with the appurtenances, with all needful and necessary reparations and amendments, and to yield them up in such repair, at the determination of the tenancy, to the lessor, his heirs and assigns. The estate and interest of Edward Finn in the demised premises subse-

A tenant, holding under a lease for lives containing a covenant for renewal, having been noticed, under the Tenantry Act, to renew, failed to do so; and the landlord served him with notice to quit (all the lives in the lease having expired), and having brought a civil-bill ejectment, obtained a decree for possession on the 10th of January 1856, with stay of execution for one month.

Before the expiration of the latter period, the tenant filed a bill, to compel specific performance of the covenant for renewal of the lease, and

obtained an *ad interim* injunction to stay proceedings until the hearing of the petition, which was dismissed on the 27th of June, and the injunction dissolved. Upon the 28th, the landlord served the tenant with notice of his intention of taking possession under the civil-bill decree, and took possession upon the 1st of July; but, in the meantime (between the 28th of June and the 1st of July), the defendant removed mill-stones and machinery from the demised premises, notwithstanding a covenant in the lease to deliver up the mill and premises at the end of the term.—*Held*, that the tenant was not entitled to remove the mill-stones and machinery from the premises—(*Per MONAHAN, C. J., and KEOGH, J.*), because he had failed to do so during the continuance of his term.—(*Per BALL, J.*), because the stay of execution of the decree had the effect of an agreement between the parties, under which the tenant was bound to deliver up the premises in the same condition they were in when the decree was pronounced by the Assistant-Barrister.

M. T. 1857. *CommonPleas.* **DEEBLE v. M'MULLEN.** quently vested in J. S. Travernan and E. Percy; and the estate and interest of Thomas Smith vested in Alice Church and others, who obtained, on the 2nd of May 1795, from J. S. Travernan and E. Percy, a renewal of the lease of 1730. All the *cestui qui ries*, both in the original lease and renewal, were dead, and the plaintiff in the present suit became entitled to the estate of Edward Finn in the demised premises; and the defendant occupied the premises as lessee to one William Power, who held them as an under-lessee (not assignee) of the estate demised to Thomas Smith. The defendant and others so claiming under Thomas Smith had been requested, by notice under the Tenantry Act, to renew the lease of 1730, but neglected to do so; and the plaintiff accordingly served them with notice to quit, and commenced a civil-bill ejectment, and, on the 10th of January 1856, obtained a civil-bill decree for possession, with stay of execution for one month from the 12th of January 1856.

Before the expiration of that period, the Churches (but not the defendant) filed a cause petition in the Court of Chancery against the plaintiff, to enforce specific performance of the covenant for renewal in the lease of 1830, and obtained an injunction to stay execution of the civil-bill decree until after the hearing of the cause; and the plaintiff having applied, in April 1856, to dissolve the injunction, the cause was set down, and came on for hearing on the 27th of June 1856, when the injunction was dissolved, and the petition dismissed. Upon the 28th, the plaintiff called upon the defendant at his mills, and told him of his intention of taking possession under the civil-bill decree, and, accordingly, took possession upon the 1st of July; but, between the 28th of June and the 1st of July, the defendant had removed the mill-stones and machinery. All the property so removed by the defendant consisted of machinery that had been erected for purposes of trade; and one portion of it was a machine called an "elevator," which had been erected by William Power, a former undertenant of the mill, in substitution for other machinery that had previously been used for the same purpose, and by him sold to the defendant, when the latter became tenant of the mills; and it appeared that the machinery originally used for that purpose

had been upon the premises in 1818 ; but it did not appear whether there had been any machinery for that purpose upon the premises in the year 1795, when the last renewal of the lease of 1730 had been granted. The jury found that the value of the "elevator" was £5, and that of the other machinery put up by the defendant and Power, in addition to, and not in substitution for, any machinery formerly upon the premises, was worth £25 ; that the defendant had purchased of Power all the machinery erected by the latter. All the machinery severed and carried away by the defendant consisted of trade fixtures attached to the mills, and actually used for working them. The question for the Court, upon the special case, was whether or not the defendant was entitled to remove the property in question ? The several leases, documents and proceedings in the action at Law and the Equity suit were incorporated by reference with the special case.

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O'Riordan (with whom was *Deasy*), for the plaintiff.

In cases of ejectment, where a consent has been entered into between the parties, for stay of execution of the *habere* for a certain period, the tenant cannot, during that period, remove fixtures : *Fitzherbert v. Shaw* (a) ; *Heap v. Barton* (b).—[*MONAHAN*, C. J. These cases appear to be decided upon a different principle, viz., a consent entered into between the parties ; whereas, in the present case, the stay of execution seems to be simply the act of the Court.—*BALL*, J. Does it appear that the tenant applied to the Court for time to institute proceedings in the Court of Chancery ?]—It must be assumed that he did, as he subsequently filed a petition for a renewal, which must be regarded at any rate as binding the tenant by estoppel. Trade fixtures, such as mills and steam-engines, become the property of the landlord upon the expiration of the tenant's term : *Minshall v. Lloyd* (c) ; *Weeton v. Woodcock* (d). In the latter case, the tenant had not been put out of possession, and it was held that he was nevertheless not entitled to remove

(a) 1 H. Bl. 258.

(b) 12 C. B. 274.

(c) 2 M. & W. 450.

(d) 7 M. & W. 14.

M. T. 1857. fixtures. *Penton v. Robart* (*a*) is the only decision the other way; *Common Pleas.* but that case, although cited in subsequent decisions, has not been followed.
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J. Clarke and T. Jones, contra.

The Chancery proceedings were not, properly speaking, between the parties to the present case, but between the landlord and Church the sub-tenant; and therefore the former should proceed against Church alone; besides, it is very questionable whether the tenant could not remove such property at any time, notwithstanding the covenant: *Bishop v. Elliott* (*b*); *Elwes v. Mawe* (*c*). As regards the time of removal—[MONAHAN, C. J. That is really the only question in the case.]—There can be no question but that the tenant is entitled to remove fixtures during his tenancy, or such time as he thinks himself to be a tenant, and a reasonable time afterwards; and the latter question is for the Court to decide: *Weeton v. Woodcock* (*d*); *Mackintosh v. Trotter* (*e*).

The cases of *Fitzherbert v. Shaw* and *Heap v. Barton* depended upon special agreement between the parties, and are therefore distinguishable.—[BALL, J. It was contended by the other side that what occurred in this case must be admitted as amounting to a special agreement.]—The case of *Penton v. Robart* is a clear decision in the tenant's favour. It is to be observed that the cases where it was held that the tenant was not at liberty to remove, after his term had ceased, were cases of tenancies for years, not tenancies for life or at will.

Deasy, in reply.

There is no doubt that the words of the covenant, viz., "necessary reparations and amendments," included something besides actual repair of the machinery then existing; for instance, the substitution of new mill-stones: *Martyn v. Bradley* (*f*). As to the other question; the right to a renewal having been extinguished, the party

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| (<i>a</i>) 2 East, 88. | (<i>b</i>) 24 L. J., N. S., Exch., 229. |
| (<i>c</i>) 2 Smith's Lead. Cas. 128. | (<i>d</i>) 7 M. & W. 14. |
| (<i>e</i>) 3 M. & W. 184. | (<i>f</i>) 9 Bing. 24. |

became tenant from year to year; and that estate was absolutely determined by the notice to quit, which distinguishes this case from those cited by the other side, there having been no agreement between the landlord and tenant to create a further period of occupation, that would be termed an "excrescence;" and although a further period may be in some cases allowed as "reasonable time," that will only be found to have been allowed in cases where the determination of the tenancy depended upon an uncertain event; whereas, in the present case, the six months' notice fixed the period of the tenancy, and itself amounted to a reasonable time.—[MONAHAN, C. J. There can be no doubt that the legal right of the landlord commenced when the notice to quit expired; and whether the tenant thought or believed that he had a right to consider himself as tenant for a further period cannot affect the decision of this Court, being a Court of Common Law, which cannot establish an equitable title to a legal estate.]

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Cur. ad. vult.

MONAHAN, C. J.

This action was brought to recover damages for the removal of the machinery of a mill.—[His Lordship stated the pleadings.]—The parties at the trial consented to state the facts in the form of a special case, for the opinion of the Court; and the only question for our decision is, whether or not, at the time of the removal, the machinery in question was the property of the plaintiff, the landlord of the premises, or of the defendant, the tenant or undertenant? It appears that a lease had been executed, bearing date the 9th of December 1730, by which Edward Finn demised the mill and premises in question to Thomas Smith, with a covenant for perpetual renewal; which lease contained, on the part of the lessee, a special covenant to maintain the mill and premises in repair during the tenancy, and to give them up in proper order at the termination of it, to the lessor, his heirs and assigns.

Nov. 25.

It has been contended that the effect of this covenant would be to vary the rights of the parties in relation to trade fixtures. We are of opinion it cannot have any such effect, and that there is nothing

M. T. 1857. in the covenant to deprive the tenant of any right in relation to such fixtures. It appears that the lessee's interest in the lease vested in persons of the name of Church ; that all the *cestui qui vies* have died, as well those in the original lease as in the last renewal, which was granted in the year 1795 ; that the defendant, who was an under-lessee of the demised estate, and some other persons, who also claimed under Thomas Smith, having received notice to renew, they neglected to do so ; and that, consequently, notice to quit was served upon the proper parties, and proceedings instituted in the Civil-bill Court, founded thereon ; that the landlord, having proved his case, obtained a decree for possession, with a stay of execution for a month (as to the authority for which we need not now inquire), to enable the defendants, if they were so advised, to institute proceedings in a Court of Equity for a renewal of the original lease. It appears that the Churches, within that period, did file a cause petition against the plaintiff, to enforce specific performance of the covenant for renewal, and also obtained an *ex parte* injunction to restrain proceedings under the civil-bill decree, until the hearing of the cause. It appears that the landlord, some time afterwards, filed an answering affidavit to the petition ; and, as far as we can see, the grounds upon which he disputed the right of the petitioners to a renewal of the lease were, that he had, before any legal proceedings were commenced, served a regular notice calling on the other parties to renew, and that he was determined to rely on their neglect to renew, as amounting to a forfeiture of their right. Upon the filing of this answering affidavit, the Master of the Rolls thought it better not to dissolve the injunction, and accordingly, the cause petition was set down for hearing ; and the Lord Chancellor decided that the tenant had forfeited his right to a renewal, having lapsed his time. The petition was accordingly dismissed, the result of which was, that the landlord became entitled to execute the decree for possession. But, in the meantime, after the Chancellor dismissed the petition, and before the execution of the civil-bill decree, the defendant, the undertenant, removed the property. The special case makes a difference between the several classes of fixtures ; but the view which we have taken

renders it unnecessary to enter into any such inquiry. It has M. T. 1857.
 been admitted, for the purpose of the argument, that, with the *Common Pleas.*
 exception of goods of the value of £5, all the rest were trade fix-
 tures, which the tenant in possession would have had a right to
 remove, had he done so during the continuance of his term and
 interest in the premises; and the question now for our decision is,
 whether the defendant, the undertenant, had the right to remove
 them at the time he did so?

In some recent cases to which we have been referred, it appears to be considered doubtful within what period the tenant is entitled to remove such fixtures. It is therefore our duty to consider the authorities on the subject, and deduce from them some intelligible rule. The earliest cases on the law of fixtures are those reported in the *Year Book*, 20 Hen. 7, pl. 13 & 26, and *Poole's case* (*a*), in the latter of which cases it was held, that if a tenant erect fixtures in relation to trade, he may remove them during the term, but "after the term they become a gift in law to him in reversion, and are not removable." So the law continued, so far as we have any means of forming an opinion, until the case of *Penton v. Robart* (*b*). That is a very peculiar case. In that case, an under-tenant erected a building for the purpose of making varnish. This building had a brick foundation let into the ground, with a chimney belonging to it, upon which a superstructure of wood, brought from another place, where the defendant had carried on his business, was raised, in which the defendant carried on his trade. The original term expired at Michaelmas 1800, in consequence of a proper notice to quit, given by the plaintiff to the executors of the original tenant; and it was admitted at the trial that the plaintiff had recovered judgment in ejectment against the defendant for these very premises; but the defendant remained in possession for some time afterwards; and, during this overholding, he pulled down the wooden superstructure, and carried away the materials: hence the plaintiff brought his action. As to the breaking and entering, the defendant allowed judgment to go by default, but pleaded the general issue as to the pulling down the building and the carrying

(*a*) 1 Salk. 368.

(*b*) 2 East, 88.

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M. T. 1857. away of the materials. At the trial, a verdict was taken for the *CommonPleas.* plaintiff, subject to the question whether, after the expiration of the term, the defendant had a right to take down and remove the matters in question? The case came on, on a motion to enter the verdict for the defendant. It was admitted, during the argument, that the erection was one which the defendant could lawfully remove during the tenancy, but it was said that he could not remove it after the end of the term, because he became a trespasser by the act of coming to or continuing upon the plaintiff's property. Lord Kenyon asked whether, if he had left any personal chattel on the premises, as a hogshead of wine, he would have been entitled to it after the term? That having been admitted, his Lordship appears to have decided by analogy that the tenant could also remove fixtures. If that case were decided upon the grounds that the things removed were not fixtures, let into and forming part of the freehold, but mere chattels, the decision would have been perfectly correct; and I cannot help thinking that the case was decided upon some ground of that kind; for I can see no analogy between the case of hogsheads of wine and fixtures attached to the soil; but if that case decided that the matters in question were fixtures, which, during the term, had become part of the land, and that the tenant was nevertheless at liberty to remove them after the expiration of his term, and after a judgment in ejectment had been obtained by the landlord, I confess that I cannot find any principle of law to justify such a decision; if the hogsheads of wine were to afford an analogy, the tenant might remove them at any time, even after the landlord had assumed possession. Accordingly, in some subsequent cases, the Judges appear not to have followed the rule supposed to have been laid down in *Penton v. Robart.*

In *Lyde v. Russell* (a), the plaintiff, in 1826, became yearly tenant to the defendant, of a dwelling-house; and during his tenancy he, at his own expense, provided and hung a quantity of bells. After he had quitted the premises, the landlord took down the bells, and refused to give them to the plaintiff, who brought his action for their removal. It was argued that, as soon as they were severed

(a) 1 Barn. & Ad. 353.

from the freehold, they became the personal chattels of the former tenant; and *Penton v. Robart* was cited; but Lord Tenterden, after giving the case much consideration, in a short but clear judgment referred to the old cases, in the *Year Book* and *Salkeld*, and states the principle deducible from these authorities to be, that the tenant can only avail himself of the privilege of removal, during the term, inasmuch as at that period the land is not the property of the landlord, and the tenant is no trespasser; but if the tenant should not avail himself of this right during the term, the land, at the expiration of it, becoming the property of the landlord, the fixtures will also become his, as being a portion of the realty. That decision appears to me to be quite consistent with the rule laid down in the cases; though it is said in *Sm. Lead. Cas.*, 15 c, that it goes further than any previous case, holding as it did that, on the tenant quitting the land, the property in the fixtures so completely vests in the landlord that, although they be subsequently severed and made chattels, the tenant's right will not revive. Then comes the case of *Weeton v. Woodcock* (a), which is, I think, inconsistent with *Penton v. Robart*, if regarded as having been decided on the ground that a man may remove his fixtures, so long as the bare possession continues. The facts of that case were these:—The plaintiff had demised, to a person who afterwards became bankrupt, a factory, with machinery, &c. The lease contained a covenant by the lessee to keep up a steam-engine and boiler, and to deliver up the possession of the premises and all things therein, at the end of the term, and a clause of re-entry in case of the breach of the covenants. A breach of covenant having been committed, the plaintiffs made an entry on the premises to enforce the forfeiture. The assignees, however, kept actual possession, until the boiler had been sold and removed. The jury, however, found that the boiler had not been removed within a reasonable time after the entry for the forfeiture. It was argued on the one side, irrespective of the covenant, that the plaintiffs were entitled to the boiler, as being a fixture, and not having been removed during the term. On the other hand, it was insisted that the assignees had the right of

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M. T. 1857. removal, so long as they continued in actual possession ; and *Penton Common Pleas.*

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M'MULLEN. "The rule collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and such further period of possession by him, as he holds the premises under a right still to consider himself as tenant."

I confess I feel at a loss to know what the cases are from which Baron Alderson obtained the latter portion of this rule, namely, so long as he holds the premises under a right still to consider himself as tenant. I could well understand that, if the tenancy expire by an uncertain event, as the dropping of a life, or, as in the case then before the Court, by the entry of the landlord for a forfeiture, that the tenant might have a reasonable term, after such determination of the tenancy, to remove the fixtures; but what is to be the criterion of the tenant's right still to consider himself as tenant, I, for one, do not clearly understand. In *Heap v. Barton* (a), Jervis, C. J., states that the Courts seem to have taken three separate views of the rule applicable to these cases; first, that the fixtures at the expiration of the term become the property of the landlord, unless during the term the tenant has exercised his right to remove them; secondly, as in *Penton v. Robart*, that the tenant may remove the fixtures, notwithstanding the expiration of the term, if he remains in possession of the premises; thirdly, that his right to remove fixtures after his term has expired is subject to this further qualification, as laid down by the Exchequer in *Minshall v. Lloyd* (b) and *Mackintosh v. Trotter* (c), that he still continues to hold the premises under a right still to consider himself a tenant. But he said that it was not necessary to intimate an opinion as to whether any one of those three positions was the correct one; as, in the case before them, the consent for judgment, with the stay of execution, given by the defendant, the tenant, prevented the tenant, during such stay of execution, from altering the condition of the premises by removing the fixtures; and that what

(a) 12 C. B. 274.

(b) 2 M. & W. 450.

(c) 3 M. & W. 84.

occurred was equivalent to an agreement on his part to give up possession of the premises to the landlord in their then condition. Accordingly, in the present case, it has been strongly contended by the plaintiff's Counsel that we ought to consider that the stay of execution given by the Assistant-Barrister was equivalent to a consent for judgment, with stay of execution, and that, without such a consent, the Assistant-Barrister would not have had the power to grant such stay. Without entering into such an inquiry, I, for my part, do not wish to make such special facts the foundation of my judgment; I prefer holding, as I do, that a tenant who remains in possession after the determination of his tenancy, by the service and expiration of a regular notice to quit, without any *bona fide* right so to do, under pretence of a right to a renewal, which had been long previously forfeited, cannot, by such his tortious and illegal overholding, acquire a right as against his landlord to remove fixtures which, in my opinion, on the determination of the tenancy, became the property of the landlord, being then affixed to and part of the freehold, which then became his property. Judgment must, therefore, be entered for the plaintiff, for the value of all the fixtures, £30.

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BALL, J.

The LORD CHIEF JUSTICE has described the law upon this subject as being in a very unsettled state, and it is not easy to decide satisfactorily between the conflicting decisions upon the point at issue. The authority of the case of *Penton v. Robart* has never been directly impeached by any subsequent authority, deciding as it does that the tenant is entitled to remove, after the expiration of his term, but during the continuance of his possession, fixtures erected by him for the purposes of his trade during the term. On the other hand, the law, from the *Year Books* down to the decision of *Penton v. Robart*, had been that the right of the tenant to remove such fixtures was limited to the period of the duration of his term at law; and accordingly, it is observed in the note* to *Hammond's Nisi Prius*, that *Penton v. Robart* is at variance with all the previous

* p. 147.

M. T. 1857. authorities, as well as with the analogy to be derived from the doctrine of emblements.

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M'MULLEN. The cases subsequent to *Penton v. Robart* are, in like manner, in some instances, difficult to reconcile either with that decision or with the old doctrine of law on the subject, or indeed with one another. In *Lyde v. Russel* (*a*), the question came on for the decision of the Court of Queen's Bench in England; and *Penton v. Robart* was relied on for the doctrine that a tenant might, even after the expiration of his term (provided his possession continued), remove fixtures erected by him for trade purposes during his term. But *Penton v. Robart* was distinguishable from *Lyde v. Russel* in this respect, that, in the latter case, the tenant had quitted the possession before he laid claim to the fixtures. However, Lord Tenterden, in delivering the judgment of the Queen's Bench, reiterated the old doctrine that the tenant must use his privilege of removing the fixtures during the continuance of his term, and that, if they remain on the premises after the term, they become a gift in law to him in the reversion, and are not removable.

In *Minshall v. Lloyd* (*b*), a different doctrine apparently was announced by Parke, B. (after referring to *Lyde v. Russel*), he holding the tenant disentitled to recover the fixtures after the expiration of the term, and after he had any right to consider himself as tenant. Whereas in the very same case, Alderson, B., is reported to have held that the tenant is entitled to his right of taking the fixtures during his possession; but the moment that expires he cannot remove them. And Bolland, B., in the same case, held that as the tenant did not remove the fixtures during his term, his right to take them was then determined. Again, in *Mackintosh v. Trotter* (*c*), Parke, B., repeats the opinion which he says he had arrived at, after much consideration, in *Minshall v. Lloyd*; only that instead of expressing it, as in that case, that the tenant is entitled to remove the fixtures during the term, and during the period subsequent to its expiration within which he had a right to consider himself as tenant, he uses the phrase that he has a right so to re-

(*a*) 1 B. & Ad. 394.

(*b*) 2 M. & W. 400.

(*c*) 3 M. & W. 186.

move them during the term, "or during what may for this purpose be considered as *an excrescence on the term.*"

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In *Weeton v. Woodcock* (*a*), Baron Alderson adopts the doctrine of Parke, B., in the two cases just referred to, holding that "the tenant's right of removal continues during his original term, and "during such further period of possession by him, as he holds the "premises under a right still to consider himself a tenant." But what are the circumstances under which a party, whose term has gone at law, is entitled, notwithstanding (being still in possession), to consider himself as tenant, is nowhere explained, and, perhaps it could not be with much confidence determined.

In this state of the authorities upon the point, I have endeavoured to see whether the present case may not be decided upon grounds unaffected by them, and without determining the controversy between them. In *Heap v. Barton* (*b*), a tenant who had the Common Law right of removing fixtures, erected by him for trading purposes, had been party to an agreement with his landlord, who had brought an ejectment against him; whereby, on the terms of his not taking defence, and allowing judgment to go by default, he was to be permitted to retain the possession for a certain time after the judgment, within which the landlord was not to execute the *habere*; and it was ruled that, under this agreement, the tenant was precluded from removing the fixtures at any time between the entry of the judgment and the day until which the landlord had postponed the execution of the *habere*; and that the premises should be given up to the landlord in the same state they were in when the judgment was marked. This decision rested chiefly upon the authority of *Fitzherbert v. Shaw* (*c*), and I apprehend is undoubted law. The question is, do the facts of this case bring it within the principle upon which the case of *Heap v. Barton* was decided? The defendant here was served with a civil-bill ejectment, and allowed judgment to go by default; and the case having been called on before the Assistant-Barrister, he decreed possession for the landlord, but provided that the *habere* should not issue for a month,

(*a*) 7 M. & W. 14.

(*b*) 12 Com. B. 280.

(*c*) 2 H. Bl. 258.

M. T. 1857. during which time the tenant should be at liberty to continue in possession; and if he should think fit, to institute proceedings in the Court of Chancery for the purpose of obtaining from the landlord a renewal of the lease. In the meantime the defendant continued in possession, and, during the period allowed for instituting the proceedings, a petition was filed in the Court of Chancery for the renewal of the lease, and was subsequently dismissed, and it was not until within a day or two before the landlord became entitled to execute the *Aetere*, that the defendant removed the fixtures in question: thus the defendant availed himself of the benefit of this arrangement, if I may so call it, which was suggested by the Assistant-Barrister, whereby he was to continue in possession, and the landlord acquiesced in it also, by forbearing to execute his *Aetere*; and I apprehend that, without the consent of both parties, the Assistant-Barrister had no power to suspend (as he did) the execution of the decree for possession, inasmuch as it is only upon an appeal being lodged that the Assistant-Barrister is so empowered.

Under all these circumstances, it appears to me that the defendant in this case must be taken to have been a party to an arrangement whereby, as in *Heep v. Burton*, he was bound to leave the premises for the landlord, at the expiration of the month allowed him to continue in possession, in the same condition they were in at the time of the pronouncing of the decree of the Assistant-Barrister; and it follows that he was not at liberty to remove the fixtures at the time when he did so.

Upon these grounds, I am of opinion that the order of the Court may be sustained.

KROCK, J.

I fully concur in the judgment of the Master Justice, and for the reasons that he has given. The authorities upon the subject are of a very conflicting character; but I conceive that the principle may be deduced from them, that a tenant is at liberty to remove fixtures during his term, or for a reasonable time after its termination, provided its removal be caused by an unexcep-

event, or in case the landlord gives the tenant reason to suppose M. T. 1857.
that he has a right to do so. But this cannot be when the landlord ^{CommonPleas.}
has served a notice to quit, and when hostile proceedings have been
taken by the tenant in a Court of Equity, and failed. In such
a case, where there exists hostility between the landlord and ten-
ant, and when the former has signified that the tenancy is to
end at a particular time, I do not think that, either by Law or
Equity, the tenant can extend the time for removing trade fixtures.
If he take his case to another tribunal, and succeed, he can then do
as he pleases ; but if he fail, he cannot revive a right that has been
determined by the notice to quit. Whether or not the Assistant-
Barrister could suspend the execution of his decree, and I conceive
that he had not power to do so, or whether the extension of the
time for execution in this case was made by consent, it appears to
me that this suspension of the decree was for one particular purpose,
and no other, viz., to allow time for the commencement of proceedings
in a Court of Equity. Those proceedings were accordingly instituted
by the tenant, who obtained an *ad interim* injunction, having pre-
viously filed a petition to obtain a renewal of the lease. That
injunction was subsequently dissolved, and the petition dismissed ;
and that being so, matters were restored to the position in which
they had originally been, and the fixtures became absolutely the pro-
perty of the landlord.

The CHIEF JUSTICE stated that Mr. Justice JACKSON,* who was
unable, through indisposition, to attend, concurred in the judgment
of the Court.

Judgment for the plaintiff.

* Since deceased.

E. T. 1858.

CommonPleas.April 20.
June 10.

W. D. F., in 1852, devised all his real and freehold estates in L. and T. (except such estates as were vested in him as mortgagee or trustee), to certain uses, with remainder to the use of J. F., for life, remainder to the first and other sons of J. F., in tail male. He then bequeathed certain pecuniary legacies to his younger son and his four daughters, payable out of his personality, amongst which he enumerated a mortgage held by him on an estate in L. In case his personality should prove insufficient, he charged all his real and freehold estates, in aid of the personality, to the extent of £6000; but declared that all real and freehold property acquired subsequent to the will should be considered as the primary fund for the payment of the bequests to his son and daughters, but should be deemed personality for that purpose only. Testator appointed J. F. residuary devisee, and subsequently died seized of real estates in L. and T. At the date of his will, he had been declared the purchaser, in the Incumbered Estates Court, of the estate in L., of which he had been mortgagee, and a conveyance was subsequently, and after the date of the will, made to him of that property. The testator afterwards made a codicil, revoking the legacy to his younger son, and stating that in all other respects he ratified and confirmed his said will.—

Held, that a sufficient intention on the part of the testator appeared on the face of the will, that the subsequently acquired estate in L. should not pass under the devise to uses, and that the residuary devisee was entitled to same absolutely.

In re FARRER'S ESTATE.

This was a special case, submitted by the Incumbered Estates Court for the opinion of the Court of Common Pleas, upon the construction of the will of W. D. Farrer, deceased.

William Dent Farrer, late of Brockley Hall, in the Queen's County, by his last will and testament, bearing date the 1st of June 1852, devised all his real and freehold estates in the counties of Limerick and Tipperary, except such estates as were vested in him as mortgagee or trustee, to the Right Hon. Richard Keatinge and Mahony Harte and their heirs, to the use that his wife should, in case she survived him, receive during her natural life an annuity of £600, and, subject thereto, to the use of other trustees, for a term of 500 years, to be computed from the testator's death, upon trust to secure the payment of the said jointure, and, subject thereto, to the use of the testator's eldest son, Captain John Farrer, and his assigns, during his life, without impeachment of waste; and from and after the death of his said son, to the use of the first and every other son of the said John successively, and the heirs male of the body of every such son of his said son; and in default of such issue, to the use of each of his other sons during his life, without impeachment of waste; and after his decease, to the use of the first and every other son successively of each such other sons, and the heirs male of the body of such first and every other son, so that the elder of his said other sons, and his first and other sons, and

their respective heirs male successively, may be preferred to and take before the younger of his said other sons, and their first and other sons, and their respective heirs male; and after the determination or failure of the several estates thereinbefore limited, to the use of his daughters in his said will mentioned.

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The testator, after giving power to his son to charge the devised estates with jointure and portions for children, and to lease, bequeathed to his four daughters £4000 each, to be paid out of any moneys he should leave at the time of his decease, in cash, Bank stock, Government securities, or secured by mortgage on the estates of his nephew W. H. Harte, in the county of Limerick, on the Kilmore estates, in the county of Clare, and on the Whaley estates, in the counties of Armagh, Carlow, Louth and Galway, and town of Galway, or any of them, and out of any personal property or effects he might die possessed of, or entitled to, or interested in, and not therein specifically otherwise disposed of.

The testator also bequeathed to his son Richard a sum of £6000, payable out of the same funds as the legacies given to his sisters. After other provisions, the testator directed that in case the moneys, funds, securities and other properties and effects liable thereto should prove insufficient for payment of the several legacies thereinbefore mentioned, then and in that case, he charged all his real and freehold estates with the payment of so much thereof as the other funds and securities, moneys, properties and effects thereby charged therewith, should be insufficient to discharge, in case such deficiency should not exceed the sum of £6000; and the will, after some other provisions, contained the following clause:—"Provided "always, that any real or freehold property I may acquire subsequent to this shall be considered as part of the funds and securities, moneys, properties and effects, so as aforesaid provided, "as the primary fund for payment of said several bequests to each "of my last-mentioned son and daughters as shall survive me, and "shall, but for this purpose only, be considered as personal estate."

After some further provisions as to interest upon the said legacies, the testator devised his house and demesne of Brockley Park, and the Garrons, which he lately purchased in the In-

E. T. 1858. cumbered Estates Court, to his wife, for her natural life, with re-
CommonPleas. mainder, after her decease, to his eldest son John Farrer, and his
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FARRER. heirs for ever, to and for their own absolute use and behoof. The testator then bequeathed some specific legacies, and appointed his wife and his son John executors of his said will, and appointed his wife residuary legatee; and in case his wife should die in his lifetime, then his son John to be residuary legatee. He further devised to his son John whatever real or freehold estate he might die seized or possessed of, and not thereby specifically disposed of, to hold to him and his heirs for ever, for his and their absolute use and benefit; but charged and chargeable with such sum or sums of money as may be necessary in order to provide a sufficient sum, along with the moneys and securities, and other properties and effects, whether real or personal, in this respect aforesaid, for payment of the several legacies thereby bequeathed; and he thereby expressly charged and incumbered such therein lastly-devised estates (if any) with payment of such legacies.

By a codicil to this will, bearing date the 25th of November 1852, the testator revoked the legacy of £6000 given to his son Richard, having made other provision for him; and in all other respects he ratified and confirmed his said will.

The lands of Gurteen, in the county of Limerick, were the estates of the testator's nephew, W. H. Harte, and had been mortgaged to the testator by two indentures of mortgage, bearing date respectively the 30th of August 1817, and the 30th of March 1820, to secure the sum of £4100, and were the only estates of the testator's nephew mortgaged to him.

In the month of October 1850, the testator presented a petition in the Incumbered Estates Court, for the sale of the lands of Gurteen. On the 11th of May 1852, the lands of Gurteen were sold by the Commissioners of the Incumbered Estates Court, for the sum of £3000, and Mr. Littledale was declared the purchaser, in trust for the testator. On the 19th of May 1852, the testator lodged the sum of £800, part of the purchase-money, in order to pay off a prior demand; and on the 9th of June 1852 (after the execution of his will), the testator got a provisional credit for the sum of £2200;

and upon the same day, the conveyance of the lands of Gurteen was executed to him by the Commissioners, but retained by them until the final settlement of the schedule of incumbrances. On the 1st of March 1853, the testator got an absolute credit, and the conveyance was delivered to him, and upon the 5th of the same month the Commissioners executed the memorial for registration.

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The testator died on or about the 25th of October 1854, leaving his wife, his eldest son John, one other son, and three daughters, surviving.

The question for the opinion of the Court was, what estate did the testator's eldest son John take in the lands of Gurteen, under the will of his father?

Todd and *Brereton*, for John Farrer, the eldest son and residuary devisee of the testator, contended that the lands of Gurteen, in the county of Limerick, passed to the residuary devisee, and were not devised to the uses declared in the early part of the will, the testator having manifested a contrary intention, within the meaning of the 1 Vic., c. 26, s. 24, that the devise of "all his real and freehold estates in the counties of Limerick and Tipperary" should not include subsequently acquired property, and that the codicil did not affect the construction of the will.

They cited *Cole v. Scott* (a); *Emuss v. Smith* (b); *Douglas v. Douglas* (c); *Circuit v. Perry* (d); *Bullock v. Bennett* (e).

Griott and *B. C. Lloyd*, contra, for the grandson of the testator, and eldest son of John, contended that the clause in question, speaking from the death of the testator, embraced the lands of Gurteen, within the general description; and that, independently of the Wills Act, the codicil, executed after the purchase of that estate, brought the will down to its date, so as to include the lands of Gurteen in the settled estates.

(a) 1 M'N. & G. 18.

(b) 2 De G. & Sm. 723.

(c) 1 Kay, 400.

(d) 23 Beav. 275.

(e) 7 De G., M'N. & Gor. 283.

E T. 1858. They cited *Lady Langdale v. Briggs* (*a*) ; *Doe v. Walker* (*b*) ;
Common Pleas. *Braybroke v. Inskip* (*c*) ; *Leeds v. Munday* (*d*) ; *Yarnold v. Walk-*
In re *lace* (*e*) ; *Goodlad v. Burnett* (*f*).

Cur. ad. vult.

T. T. 1858. **MONAHAN**, C. J., delivered the judgment of the Court.

June 10.

This case, which was argued before us some time since, was sent to us by the Commissioners of the Incumbered Estates Court. It is one of some difficulty, and occasioned much consideration among the Members of our Court. It appears from the case that William Dent Farrer, by his will, dated the 1st of June 1852, devised all his real and freehold estates in Limerick and Tipperary (except such estates as were vested in him as mortgagee or trustee), to certain trustees, to the use that his wife should receive thereout, for her life, an annuity of £600, and, subject thereto, to the use of certain other trustees, for a term of years to secure the annuity; and subject thereto, with remainder to the use of his eldest son, John Farrer, for life; remainder to the first and other sons of his said son John, in tail male. Then he bequeathed to each of his four daughters a sum of £4000, "to be paid out of any moneys " which he should leave at the time of his decease, in cash, Bank " stock, Government securities, or secured by mortgage on the " estate of his nephew, William Henry Harte, in the county of " Limerick, on the Kilmore estate in the county of Clare, and on " the Whaley estates in the counties of Armagh, Carlow, Louth and " Galway, and town of Galway, or any of them, and out of any " personal property or effects that he might die possessed of or " entitled to, or interested in, and not thereby specifically disposed " of." He also bequeathed to his second son Richard Henry Farrer a sum of £6000, payable out of the same funds as the legacies to his sisters; and he then directed, that, in case the moneys, funds and securities and other property and effects liable thereto, should

(*a*) 2 Jur., N. S., 35.

(*b*) 12 M. & W. 591.

(*c*) 8 Ves. 416.

(*d*) 3 Ves. 348.

(*e*) 4 Y. & C., Ex., 160.

(*f*) 1 K. & J. 341.

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prove insufficient for the payment of the several legacies therein- before mentioned, he thereby charged all his real and freehold estates with the payment of so much as the other funds charged therewith should prove insufficient to discharge, but that such charge should not exceed £6000, and he then directed as follows:—"That any real or freehold property I may acquire subsequent to "this shall be considered as part of the funds and securities, "moneys, properties and effects, so as aforesaid provided, as the "primary fund for payment of the said several bequests to such "of my sons and daughters as may survive me, and shall, but for "this purpose only, be considered as personal estate." He then devised his house and demesne of Brockley Park, and the Garrons which he had lately purchased in the Incumbered Estates Court, to his wife, for life, remainder to his eldest son John Farrer, in fee, and he appointed his said wife and eldest son his executor and executrix, and his wife residuary legatee; and in case of his wife dying in his lifetime, he then appointed his son John residuary legatee; and he devised to his son John whatever real and free- hold estates he might die seised or possessed of, and not thereby specifically bequeathed or disposed of, at the time of making his will. The testator was seised in fee-simple of certain estates in the counties of Limerick and Tipperary, and of the Brockley Park estate, in the Queen's County; and prior to the making of his will, he had a mortgage affecting the property of his nephew, W. H. Harte, in the county of Limerick. Shortly before the making of the will, this pro- perty had been put up for sale in the Incumbered Estates Court, and the testator became the purchaser, through Mr. Littledale as his trus- tee, and lodged a portion of the purchase-money; so that at the time of making his will he had not only the legal estate in these lands, as mortgagee, but he had also entered into a binding contract for the purchase of the interest of the mortagor, by reason of being the best bidder at the sale in the Incumbered Estates Court. Subsequently to the making of the will, the sale in the Incumbered Estates Court was confirmed, according to the course of that Court; and a conveyance was executed to the testator, who got a provi- sional credit for the balance of the purchase-money. The convey-

T. T. 1858. ^{*Common Pleas.*} *In re FARRER.* ance was kept in Court for some time, but was afterwards delivered to him; and thus, in his lifetime, the testator became absolute owner of the estate, which had been originally vested in him as mortgagor. In this state of facts, he made a codicil to his will, dated the 25th of November 1852, by which he revoked the legacy of £6000 to his son Richard, "having already made a provision for him; and in all other respects he ratified and confirmed his said will." I omitted to state that by his will the testator devised his residuary estate to his son John, charged with the payment of as much money as should be necessary for the payment of the several legacies bequeathed. The testator, having made the codicil, died shortly afterwards; and the question now arises, having regard to the will and codicil, and the recent Wills Act, whether the estate which the testator purchased in the Incumbered Estates Court, and became the absolute owner of, before the making of the codicil, passed under the will in strict settlement, by the description of his real and freehold estates in the county of Limerick, or whether it passed to his eldest son absolutely by the latter clause in the will, as being not otherwise disposed of thereby? We have been referred to several cases on the subject; but, in the present case, much assistance is not to be derived from authority, as the principle which ought to govern such cases is sufficiently well known, and the difficulty is the application of the principle to the facts of each particular case. By the 24th section of 1 Vic., c. 26, it is enacted, that every will shall be construed with reference to the real estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and independent of the Wills Act altogether, no doubt the rule of law was, that when a will was re-published by the execution of a codicil, *prima facie* the will operated as if it had been executed at the time of the re-publication; subject, however, to the exception that a contrary intent did not appear by the will itself: *Stillwell v. Mellersch* (a); *Hughes v. Hosking* (b); *Lady Langdale v. Briggs* (c); so that,

(a) 20 Law Jour., Chan., N. S., 356. (b) 28 L. T. 150.

(c) 3 Jur., N. S., 982; S. C., 3 Sm. & G. 225.

in this respect, the effect of the recent Act, on wills made since it came into operation, is not substantially different from the rule before the Act, as to the effect of re-publication by a codicil on property immediately acquired. In the present case, there is no doubt that the words, "all my real and freehold estates in the counties of Limerick and Tipperary," are quite sufficient to pass subsequently acquired property in those counties, under the Wills Act, though no codicil had been executed subsequent to its acquisition, or by the effect of re-publication, even though the Wills Act had never been passed. For this, the case of *Doe d. York v. Walker* (*a*) is an express authority, in which a devise "of all my messuages, farm-lands and hereditaments, of which I am seized or entitled in possession, reversion or expectancy, in the parish or lordship of Great Bowden, in the county of Leicester," was held sufficient to pass subsequently acquired lands in the same parish or lordship. We therefore should hold, in the present case, that the property in question passed under the description of his estates in Limerick, unless we find in the will itself a contrary intention; and in no way can that intention be more satisfactorily discovered than by finding an intention that subsequently acquired property should be disposed of differently from the property vested in the testator at the time of making his will; for example, if a testator by his will devised all his property, in one county, to one person, all his property in another county to another person, thus exhausting all his then real estates, and should devise all his subsequently acquired real estate to a third person, it cannot be doubted that the subsequently acquired real estates in the specified counties would pass to the donee of the subsequently acquired property, and not to the specific donees of the lands in these counties.

In *Cole v. Scott* (*b*), testator devised his house by the description of "the house in which I now reside;" and made another devise of "the residue and remainder of my messuages, whereof I am now seized and possessed;" he also devised "all such manors, as well freehold as copyhold and leasehold, as are now vested in me, or as

(*a*) 12 M. & W. 521.

(*b*) 16 Sim. 259; on appeal, 1 M'N. & G. 518.

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T. T. 1858. "to the said leasehold premises shall be vested in me at the time
CommonPleas. "of my death." Vice-Chancellor Shadwell first held, and afterwards
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FARRELL. Lord Cottenham, on appeal, that subsequently acquired property did not pass under this residuary clause; Lord Cottenham apparently being of opinion that the words "whereof I am now seised" were equivalent to saying "whereof I am seised on the 29th of April 1843," the date of the will; and also remarking that the will itself made a disposition of subsequently acquired leasehold property, which he considered as expressing an intention that subsequently acquired freehold property was not intended to be devised by it. It is not saying too much that, so far as this case turned on the words "whereof I am now seised," it has, to say the least of it, been doubted in subsequent cases; but so far as it turned on the fact that the will itself made a distinction between the then existing and subsequently acquired property, it seems to be considered as having been properly decided. In the case before us, the will charges his general real estate thereby devised, i. e., those lands in Limerick and Tipperary, which were devised in strict settlement, and his Queen's County estates, which were devised to his wife, for life, remainder to his son, in fee, with the payment of the legacies to his daughters, but only as the secondary fund for the payment thereof, and only to the extent of £6000; while, on the contrary, he directs that his subsequently acquired real estate shall be a portion of the primary fund for the payment of his legacies, and for that purpose considered as personal property. At the time of the execution of testator's will, he had been declared the purchaser of the lands in question at a sale in the Incumbered Estates Court. Notwithstanding this, he directs that the sum due on the mortgage affecting same shall be a portion of the primary fund for the payment of his legacies, treating his interest thereon as that of mortgagee. Having regard to the several provisions in the will, we have come to the conclusion that we find in it an intention that the interest in the lands in question, which he then contracted for, and which was afterwards conveyed to him, should not pass by the description of his real and freehold estates in the counties of Limerick and Tipperary; but that same should be considered as

personalty, for the payment of his legacies, and, subject thereto, T. T. 1858.
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should pass to his eldest son as real estate, not otherwise by his said
will disposed of; and we shall therefore certify that, in our opinion,
same passed, under the latter clause in the will, to the testator's
eldest son.

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CONEYS and others v. CONEYS.

Nov. 18, 19.
Dec. 2.

THIS was an ejectment on the title, to recover possession of the lands of Streamstown in the county of Galway. The action was tried before KEOGH, J., at the Galway Summer Assizes 1858. It there appeared that the principal plaintiff claimed under a lease executed in 1853, by the widow and two children of John Coneys, with the authority of another son, who was in America. It likewise appeared that Walter Coneys, the father of John and of the defendant Edward Coneys, died in March 1820, possessed of the lands in question, of which he was lessee for the term of three lives and thirty-one years, at the yearly rent of £72 Irish currency, still subsisting. By his will, dated the 14th of March 1826, he bequeathed to his son John "That part of the lands of Streamstown called Bullock, Tulock, the Prisoners' park, Rosroe and the portions or denominations of land subject to a yearly rent of £26 Irish currency, over and above all taxes and other legal impositions." He further bequeathed to his son Edward "All that and those the remainder of the farm of Streamstown, together with

W. C., by his will, devised part of the lands of S. to J. C., and directed that E. C. should be entitled, under his will, to receive from J. C. the sum of £26, being the rent of the portions and denominations thereinbefore bequeathed to him. J. C. and E. C. afterwards verbally agreed that J. C. should have an additional denomination of land, which W. C. had devised to E. C., reserving to E. C. grazing for ten head of cattle, at the rent of £18. 10s., in

lieu of the rent of £26. E. C. subsequently served the plaintiff, the assignee of J. C., with a notice to quit, treating him as a yearly tenant, and brought a civil-bill ejectment against him, which was dismissed by the Assistant-Barrister, upon the ground that there was no yearly tenancy proved to exist, but the dismiss was afterwards reversed on appeal by the Judge of Assize, and a decree for possession made, which was duly executed. Thereupon the plaintiff brought a cross-ejectment, and relied upon the invalidity of the civil-bill proceedings.—*Held*, that notwithstanding that the civil-bill proceedings appeared *prima facie* regular, the plaintiff in the cross-ejectment might show the non-existence of such a tenancy between the parties as would have been required to give the Civil-bill Court jurisdiction, notwithstanding the 133rd section of the 14 & 15 Vic., c. 57.

M. T. 1858. "the dwelling-house and offices erected thereon, leaving said house
CommonPleas. "and premises, and the remainder of the farm, subject yearly and
CONEYS "every year to a sum of £10 Irish, to be paid to my daughter Jane."
v. CONEYS. After bequeathing another annuity of £5 to his daughter Charlotte,
he directed that the said Edward should be subject to the rent,
ensuing, growing and accruing yearly and every year, to John
Darcy, Esq., the landlord, being £72 Irish currency yearly. He
likewise directed that Edward should be entitled under his will to
receive from John the sum of £26, being the rent of the portions
and denominations thereinbefore bequeathed to him. John Coneys,
by his will, dated the 25th of April 1834, devised and bequeathed
his freehold and other property amongst his widow and children,
share and share alike. It also appeared that, after the death of the
father, the two brothers came to an arrangement by which John
was to get an additional denomination of land called Cloughboulagh,
in addition to the lands devised to him, reserving to Edward, the
defendant, grazing for ten head of cattle, at the rent of £18. 10s.
a-year. It was part of the defendant's case that John paid this rent
under the agreement, and that the plaintiff, when he got possession
from the widow, continued to pay it to defendant, who grazed
ten head of cattle on the lands, and subsequently made over that
right to a tenant. Receipts of the rent were produced in evidence.
He never made any lease of the land, either to his brother or to any-
one else, in writing, but some time since served the plaintiff with
a notice to quit, treating him as a yearly tenant, and subsequently
proceeded against him in a civil-bill ejectment, which was dismissed
by the Assistant-Barrister, on the ground that no tenancy was
proved to exist. An appeal from that dismiss having been brought
before the next going Judge of Assize, he reversed the dismiss, and
granted a decree, holding that there was a yearly tenancy. The
plaintiff having been turned out of possession under that decree, the
present cross-ejectment was brought. At the close of the plaintiff's
case, Counsel for the defendant called upon the learned Judge to
direct a verdict for the defendant, upon the ground that it appeared,
upon the plaintiff's evidence, that the defendant had recovered the
land from the plaintiff by a decree of the Judge on appeal, made

against the plaintiff as an overholding tenant, submitting that that decree was conclusive, and ought to be a bar to the present action, in which the plaintiff claimed the land under the same title as he had when he paid rent to the defendant; and therefore that this action had been brought for the purpose of reversing the decree so made by the Judge, contrary to the 133rd section of the Civil-bill Act, 14 & 15 Vic., c. 57. His Lordship declined so to direct, but reserved the question, and the defendant proceeded with his case as previously stated; at the close of which his Lordship directed a verdict for the plaintiff, the jury having found that no tenancy existed.

A conditional order was subsequently obtained, upon the ground of misdirection, and the verdict being against evidence, and the weight of evidence.

C. Kelly (with whom was *P. Blake*) showed cause, and contended that, assuming that a tenancy from year to year did not exist, the decree of the Civil-bill Court was invalid, for want of jurisdiction, and that the plaintiff was entitled to bring a cross-ejectment. The rent payable to the defendant was in the nature of a rentcharge, and the new agreement did not operate to create a tenancy from year to year. The 133rd section of the Civil-bill Act only renders the proceedings in that Court final, provided that the subject-matter be within its jurisdiction; but it was competent for the plaintiff to show that the relation of landlord and tenant, which was the foundation of that former action, never existed.

Fitzgibbon and *M. Morris*, contra, in support of the conditional order, contended that there was evidence of a tenancy from year to year; and that, at all events, the proceedings in the Civil-bill Court, being regular on the face of them, were conclusive against the right of the plaintiff to maintain a cross-ejectment.

P. Blake replied.

[The nature of the arguments and the authorities referred to on both sides fully appear from the judgment of the Court.]

Cur. ad. vult.

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M. T. 1858. MONAHAN, C. J., delivered the judgment of the Court.
Common Pleas. This case is not free from difficulty. The facts are these:—
CONEYS The plaintiff in the present action brings an ejectment on the title,
v. to recover certain lands in the county Galway; and her case is,
CONEYS. that these lands were originally held under a lease for lives, made
Dec. 2. to the father of the defendant, who, by his will, disposed of them
in this way:—he left a portion of the land to his second son, the
then husband of the present plaintiff, and the remainder to the
defendant, his third son—charging the portion devised to plaintiff's
husband with a rentcharge. The terms of the devise were such
that the whole estate and interest which the testator had in these
lands passed under it; and, according to the legal operation of the
will, the plaintiff's husband took the entire interest in a portion
of the lands, but charged with a rentcharge for the benefit of the
defendant, the devisee of the residue of the land, being the pro-
portion which testator thought fit that plaintiff's portion should
contribute towards the head-rent.

Some time after the death of the testator, the second son, devisee
of the particular portion of the land, considered the proportion of the
head-rent chargeable on his land too large. An arrangement was
entered into between him and his brother, by which it was agreed
that some portion of mountain land should be given up to the plain-
tiff's husband, in addition to the lands devised to him, and that the
proportion of the head-rent payable by him should be reduced some
few pounds. The plaintiff's husband remained in possession during
his life, under this arrangement, and paid, towards the head-rent
of the entire farm, the reduced sum so agreed on. He, before his
death, made his will, and, considering he had a permanent interest
in the lands, devised same to the plaintiff, his widow, for the benefit
of herself and their children. Shortly after her husband's death, the
plaintiff thought it adviseable to emigrate with her children to
America, but, before doing so, set the lands at a profit-rent of some
few pounds over the proportion of head-rent payable by her; and
tenant entered into possession shortly after she went to America.
The defendant served a notice to quit on the party in possession,
treating him as a tenant from year to year, and at the expiration

thereof brought an ejectment in the Civil-bill Court, against the M. T. 1858.
tenant so in possession, and the plaintiff and her children, who were
in America, and had them served, I suppose, by posting the civil-bill
ejectment on the premises; at all events no point was made as to
the non-service of this ejectment, and the case has been argued
on the supposition that same was duly served on all proper parties.

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At the trial of the civil-bill ejectment, before the Assistant-Barrister for the county of Galway, the present defendant (the plaintiff in the civil-bill) insisted that, though under his father's will his deceased brother was entitled to an absolute interest in the portion of the lands devised to him, and that he (the plaintiff) had no reversion or interest therein, save the right to the rentcharge chargeable thereon, yet that his brother disclaimed or refused to hold or take the lands under the will, but agreed to hold them and the additional piece of mountain land as tenant from year to year, to him (the plaintiff), at a rent some few pounds less than the rentcharge charged thereon by the will of the testator. The defendants in the civil-bill ejectment, on the other hand, insisted that such was not the effect of the arrangement entered into between the plaintiff in the civil-bill and his deceased brother, but that the arrangement was, that he should still hold under the will, though subject to a reduced rentcharge; and that, though the relation of landlord and tenant might probably subsist, as to the piece of mountain land, between the two brothers, that same did not subsist as to the lands devised to plaintiff's deceased brother, and that same were held under the will. The learned Assistant-Barrister was of this opinion, and dismissed the civil-bill ejectment process. From this dismiss the plaintiff therein appealed to the next Assizes; and the case came on before the learned Judge. He heard the case at length, and came to a different conclusion from that come to by the Assistant-Barrister; he holding that in fact the relation of landlord and tenant did subsist between the two brothers, and that the husband of the present plaintiff had the entire lands as tenant from year to year to his brother, the plaintiff in the civil-bill ejectment; and the learned Judge accordingly reversed the dismiss pronounced by the Assistant-Barrister, and made a

M. T. 1858. decree in favour of the plaintiff, under which he was put into possession of the premises; and the present ejectment has been brought by the plaintiff, Mrs. Coneys, and her tenant, to whom she had let the lands, to recover the possession of the part devised to her deceased husband by his father. At the trial of the case, at the last Assizes for the county of Galway, before my Brother KEOGH, in answer to the *prima facie* case of the plaintiff, under the will of her husband and of his father, the defendant went into evidence to show that, in fact, plaintiff's husband had refused to hold under his father's will, and had become his tenant from year to year, which would have had the effect, as he contended, of putting an end to his interest under the will. And he further insisted that, even if he failed in this part of the case, yet that the proceedings in the Civil-bill Court, and the decree of the Judge on the appeal, were conclusive on the parties, and that the propriety of the conclusion to which the Judge came on the hearing of that appeal could not be questioned in the present ejectment. With respect to the first question, namely, whether plaintiff's husband became tenant to the defendant, my Brother KEOGH left the question to the jury; and no objection has been suggested as to the manner in which he did so; and, with respect to the second point, he was of opinion that if the relation of landlord and tenant did not in fact subsist between the parties in the civil-bill proceedings, that the decree therein was not conclusive on the plaintiff in the present ejectment; and that, notwithstanding such proceedings, the plaintiff was entitled to recover, if, in fact, plaintiff's husband had not become the tenant of the defendant, as alleged by the defendant in his evidence. The jury found that in fact plaintiff's husband did not become the defendant's tenant, and therefore found a verdict for the plaintiff; but the learned Judge reserved liberty for the defendant to apply to have the verdict entered for him, if he should have so directed: and the defendant has accordingly obtained a conditional order to have the verdict entered for him, in pursuance of the leave reserved; or, in case the Court should not comply with that portion of his order, to have the verdict set aside, as against the weight of evidence. With respect to this latter portion of the order

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to set aside the verdict, we do not think there is any pretence for it. The jury found, notwithstanding the evidence of the defendant, that plaintiff's husband never held or agreed to hold the land as defendant's tenant. So far as we are capable of forming an opinion on the subject, we would be very much surprised if the jury had come to any other conclusion; we are quite satisfied that the case of a tenancy from year to year, instead of a holding under the will for the entire term of the original lease, was a mere fancy of the defendant, having no foundation in fact; and therefore, so far as merits are concerned, the plaintiff has no case, and there are no grounds whatever for setting aside the verdict, as being against the evidence. The much more serious question, however, remains, whether the defendant is entitled to rely on the proceedings in the Civil-bill Court, and on the appeal therefrom, as a bar to the present ejectment. Defendant's Counsel relied on the 133rd section of the Civil-bill Act (14 & 15 Vic., c. 57), by which it is enacted, that all decrees of the Assistant-Barrister unappealed from, and of the Judge of Assize on appeal, shall be absolutely final, to all intents and purposes, and shall not be removed by writ of error or otherwise to any Superior Court, and shall not be capable of being reversed; and he insists that the effect of this section is, to render the decree of the Assistant-Barrister or Judge a conclusive bar to the present ejectment. We, however, cannot adopt that argument; we do not think that such is the construction of the section referred to; the effect of the section is merely to render the decree final in the suit, and incapable of being reversed by any direct proceedings for the purpose; and the effect of the decree of the Assistant-Barrister, in other collateral proceedings, must depend on the provisions of the Act, and the effect given by the Common Law to the judgments of Courts of Justice. The first section of the Civil-bill Act giving the Assistant-Barrister jurisdiction to entertain ejectments is the 71st, which enables him to hear and determine all disputes between party and party, relating to lands within his jurisdiction, to the extent and in manner following; that is to say, if any tenant holding any tenement, who shall be in arrear one half-year's rent, shall desert the tenement demised to him, or leave the same

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uncultivated, or carry off the stock or crop, or otherwise abandon the same, leaving no sufficient distress, it shall be lawful for the landlord or lessor of the tenement so deserted to proceed by civil-bill. It will be observed, that the early portion of the 71st section, namely, that which enables the Assistant-Barristers to determine disputes relating to lands, to the "extent and manner following," applies not only to the case provided for by the 71st section, but also the following sections. The 72nd section is in these words:—"In all cases, where lands shall be held by any tenant at a rent not exceeding £50 per year, and the tenant's interest shall have determined, it shall be lawful for such landlord or lessor to proceed by civil-bill;" and this is the section under which the proceedings were had in the present case. The 73rd section applies to ejectments for non-payment of rent, and commences exactly in the same way as the 72nd, both being governed by the early part of the 71st section. The 79th section also applies to ejectments, but not to cases between landlord and tenant, and therefore is not immediately bearing on the present case. Reading the early part of the 71st section in connection with the 72nd, the Assistant-Barristers are authorised to hear and determine all disputes between party and party respecting lands, "to the extent following; that is to say, in all cases where lands shall have been held at a rent not exceeding £50 per year, and the tenant's interest shall have determined," the landlord may proceed by civil-bill, &c.

The question for our determination now is, if a party who is not in fact a landlord proceeds against his alleged tenant in the Civil-bill Court, and, by mistake of the Assistant-Barrister or Judge of Assize, obtains a decree for possession, is it competent for the defendant, who has been dispossessed, under such decree, to bring an ejectment in a Superior Court, and recover possession of the lands, showing that the relation of landlord and tenant did not in fact subsist between the parties? The defendant's Counsel contend that, as the lands are in the county within the jurisdiction of the Assistant-Barrister, and, as the plaintiff in the civil-bill stated a case within the Act of Parliament, namely, a holding at a rent not exceeding £50 per year, and a regular determination of the tenancy by notice to quit, the case was properly brought within

the jurisdiction of the Assistant-Barrister, and that no other Court can question the propriety of his decision ; that it was his duty to inquire and satisfy himself whether the relation of landlord and tenant did exist ; that he, or rather the Judge on appeal, did in fact make the inquiry, and came to the conclusion that the relation did exist, and that his decree is conclusive on the parties in this action ; and, in support of that position, he refers to the case of *Britain v. Kinnaird* (*a*), which was an action against two Magistrates, for illegally seizing plaintiff's vessel. The defendants relied on a conviction by them, that it was a boat illegally carrying gunpowder on the Thames, in violation of an Act of Parliament, since expired. The plaintiff tendered evidence to show that in fact the vessel was not a boat within the provisions of the Act. The Court, however, held that, whether it was or was not a boat within the Act was for the Justices to decide, and that, having decided it, their decision could not be questioned in the action so brought against them. My Brother CHRISTIAN has also referred us to the case of *Regina v. Bolton* (*b*). In that case, a conviction or order, made by two Magistrates, under the 52 G. 3, c. 12, s. 24, was removed by *certiorari*, for the purpose of being quashed. The statute enabled the Magistrate to make an order to put the overseers of the poor into the possession of parish houses occupied by any poor person by the permission of the overseers, who over-held same after demand of possession by the overseers. On the motion to quash the order, the question was, whether affidavits could be received to show that the house in question was not in fact held by Bolton, by the permission of the overseers, and that the Magistrates had come to a wrong conclusion, in determining that it was so held. After time taken to consider, Lord Denman delivered the very clear and able judgment of the Court. He stated the only thing the Court could do was, to inquire whether the matter was within the jurisdiction of the Magistrates ; that, if within their jurisdiction, the Court could not quash the order, no matter how erroneous on the merits the judgment of the Magistrates was, provided it was legal and regular on the face

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M. T. 1858. of the proceedings. And he further held that, whether the case was within the jurisdiction of the Magistrates depended on this, did or did not the complaint made before the Magistrates state a case over which the statute gave them jurisdiction? and that if it did, they were bound to investigate the case; and their decision, however mistaken, even from corrupt motives, could not be reversed, by quashing the conviction or order; but that, if the complaint originally made before them did not show a case within their jurisdiction, they could not, by mis-stating the complaint, give themselves jurisdiction. If the principle on which the cases of *Britain v. Kinnaird* (a) and *Regina v. Bolton* (b) were decided applies to the case before us, no doubt they would be very strong authorities in favour of the defendant, because it is conceded that the civil-bill process in the present case stated a case within the jurisdiction of the Court; and, no doubt, the plaintiff's evidence in the Civil-bill Court went some way to establish such a case. But there is this distinction between those cases and the present; *Britain v. Kinnaird* was an action against the Magistrate, for whose protection the conviction was held conclusive evidence of the facts therein stated; and, though *Regina v. Bolton* was not an action against the Magistrates, still if the conviction or order had been quashed, it would have deprived the Justices of its protection; and, therefore, these and similar cases may have been decided as being necessary for the protection of the Magistrates; as otherwise, who would be safe in acting as a Magistrate? as is observed by the Judges in the case of *Britain v. Kinnaird*. And, in Mr. Taylor's book on *Evidence*, vol. 2, pp. 1286-9, these cases are referred to this principle; and I am not aware, in any case between the parties to a summary proceeding before Justices, either of them was precluded from showing in a subsequent proceeding that the Justices had not in fact jurisdiction; and, no doubt, as a general rule, where jurisdiction is given by statute to an Inferior Court over a particular subject-matter, and the Court assumes to deal upon a matter not within their jurisdiction, the party against whom such decision is made will not be barred or estopped by it in a sub-

(a) 1 B. & B. 6.

(b) 1 Q. B. 66.

sequent proceeding for recovering the property the subject-matter of M. T. 1858.
the previous decision. A leading case on this subject is *Annesley v. Dixon* (a), and very fully stated by my LORD CHIEF JUSTICE, in his judgment, in the case of *Errington v. Rorke* (b). The Irish Act 11 & 12 W. 3, c. 2, vested all estates forfeited in the rebellion in trustees as Commissioners for sale ; the 8th section gave the Commissioners power to examine on oath, for the purpose of ascertaining persons who were attainted, and discovering their property ; by the 12th section, persons having claims were to come in, and the Commissioners were empowered to adjudicate on those claims ; the 16th section made every decree of the Commissioners final, and conclusive and binding on all persons ; the 23rd section provides for the conveyances to be executed by the Commissioners to the purchasers ; and by the 25th section it is enacted that every purchaser having such conveyance shall be adjudged to be in the actual seisin and possession of the lands purchased and conveyed, and shall hold the same freed and discharged from all arrears of quit rent, and from all other claims and demands of his Majesty, and of the said Commissioners, and of all other persons, other than and except such claims and demands as shall be allowed by the Commissioners, on the examination of such claims as aforesaid.

In proceeding under this Act, the Commissioners assumed jurisdiction over a particular estate, alleging it had been forfeited. Dixon put in a claim, alleging it was his, and had not been forfeited. The Commissioners decided it had been forfeited, and sold it to Annesley. Dixon brought an ejectment in the King's Bench in this country, for recovery of the property, against Annesley, who relied on the judgment and conveyance of the Commissioners. The King's Bench decided in favour of Dixon, holding that the jurisdiction of the Commissioners was confined to forfeited estates, and that there was nothing in the Act rendering the judgment of the Commissioners conclusive evidence that the estate was in fact forfeited, though there was quite sufficient in the Act to render their judgment conclusive as to all claims and charges affecting estates which were in fact forfeited. A writ of error was brought on this judgment to the King's

(a) Holt's Rep. 372.

(b) 6 Ir. Com. Law Rep. 353.

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M. T. 1858. Bench in England, and the judgment, after great consideration, was affirmed; Lord Holt, in his masterly judgment, showing that the proceedings were void as *coram non Judice*; the jurisdiction being given over only forfeited estates. It must not be supposed that the decision of the Exchequer Chamber in this country, in the case of *Errington v. Rorke*, is at all inconsistent with the case of *Annesley v. Dixon*, inasmuch as the majority of the Court held, for the reasons which I stated at length in *O'Donnell v. Ryan* (*a*), that though it was intended to give jurisdiction to the Commissioners only over estates in fact incumbered, yet that some of the sections of the Act, to which it is not necessary now to refer, rendered the conveyance of the Commissioners to the purchaser conclusive evidence of their right to sell, and that the estate was in fact incumbered. So in the present case, the jurisdiction is given to the Assistant-Barrister to entertain ejectment cases only in cases between landlord and tenant. Still, if we could find any section in the Act rendering the decree of the Assistant-Barrister conclusive evidence that the relation of landlord and tenant did in fact subsist between the parties, we of course would be bound to give effect to such an enactment, as Lord Holt and the other Judges of the King's Bench in England admitted they would have been bound to do, in *Annesley v. Dixon*; that case having been decided altogether in the absence of any such provision, or any authority expressly given to the Commissioners to decide whether the estates were in fact forfeited or not; though, no doubt, in executing their powers under the Act, they should incidentally make such inquiries. There are, however, a class of cases to which we have been referred by the Counsel for the plaintiff, the principle of which we are unable to distinguish from the present—I allude to the case of *Lessee Black v. Davis* (*b*), and the case of *Lessee Bond v. The Trustees of Sterne's Charities*, therein stated by the Chief Justice, in his judgment, and reported in the note to p. 87. In that case, Bond held under the trustees under a fee-farm grant, in the form of a lease, containing the ordinary clauses and covenants usually contained in leases. The trustees brought an ejectment for non-payment of rent, and obtained

(*a*) 4 Ir. Com. Law Rep. 66.

(*b*) Bat. 80.

judgment by default, executed their *habere*, and entered into possession. Very nearly twenty years after, the heir of Bond brought an ejectment on the title to recover the lands, on the ground that the proceedings in the previous ejectment for non-payment of rent were no bar, they being *coram non Judice*, the relation of landlord and tenant not subsisting between the parties; and of that opinion was the Court of Common Pleas, on a bill of exceptions, and Bond recovered the lands. In the case of *Lessee Black v. Davis*, the previous recovery in an ejectment for non-payment of rent was held to be no bar to a subsequent ejectment, the lessor of the plaintiff in the ejectment for non-payment of rent having, since the execution of the lease, and prior to the bringing of the ejectment, mortgaged his reversion, and there being no demise in the name of the mortgagee; the King's Bench held the proceedings in the ejectment for non-payment of rent void, the mortgagor having, on the execution of the mortgage, ceased to be landlord. In the case of *Lessee Black v. Davis*, some question was raised whether the judgment being by default was of the same effect as if it had been in a defended action, and the Court held clearly that it was; and as put by the Chief Justice, in his admirable judgment, in p. 99. This opens at once the question upon the words in the 4 G. 1, c. 5, which equally applies to judgments by default and to judgments upon verdict:—"And in case the lessee or lessees shall permit "and suffer judgment to be had and recovered on such ejectment, "and execution to be executed thereon, without paying on demand "the rent so ascertained as aforesaid to be in arrear, together with "full costs, &c., &c., then and in such case the lessee and all persons "claiming and deriving under the same lease shall be barred and "foreclosed from all relief or remedy in Law or Equity other than "by writ of error; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease." The Chief Justice then proceeds to show the anomalous consequences that would follow if it were held that the previous proceedings were conclusive on the right, and concludes his judgment in these words:—"These anomalous consequences show that "the construction put upon the statute by Mr. Bell and Mr. Holmes

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M. T. 1858. "is the sound one, viz., that it only operates between landlord and
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"rent, upon which Courts of Law and Equity, before the statute,
"had been in the habit of giving relief, but does not conclude the
"fact that such relation existed when the ejectment was brought."

As I have already stated, it is the 73rd section of the Civil-bill Act which enables the Assistant-Barrister to entertain ejectments for non-payment of rent, where the premises are held at a rent not exceeding £50 per year; and it is thereby provided that in case the tenant or tenants, his or their assignee or assignees, or other persons claiming or deriving under him or them, shall suffer the decree to be executed, putting the lessor or landlord into possession of the premises, without paying the rent and arrears thereon, with costs, or without preferring a civil-bill for relief to the Assistant-Barrister, or filing any bill for relief in Equity, within the time now limited by the several statutes which regulate the action of ejectment for non-payment of rent, after such execution executed, then and in such case the tenant and his assigns, and all persons deriving under him, shall be barred and foreclosed from all relief or remedy, in Law or Equity, other than by appeal from said decree. This provision of the 73rd section of the Civil-bill Act is, if not in the very words, certainly in substance, the same as the provision in the Landlord and Tenant Act, on which *Lessee Bond v. The Trustees of Sterne's Charities*, and *Lessee Black v. Davis*, were decided; and if the ejectment before the Assistant-Barrister had been for non-payment of rent, under the 73rd section, I do not see how the case now before us could have been distinguished in principle from these cases; and though, in the present case, the ejectment before the Assistant-Barrister was on the 72nd section, on the title, as against an overholding tenant, it occurs to us to be quite impossible to give a different construction to the two sections.

In the recent case of *Betty v. Nail* (a), the Court of Exchequer had occasion to consider the effect of a decree of the Assistant-Barrister's Court, in an ejectment for non-payment of rent. It

(a) 6 Ir. Com. Law Rep. 17.

appeared in that case that Henry Plowman, the tenant, had emigrated to America. In the civil-bill ejectment he was stated to be the tenant: in the ejectment on the title in the Exchequer, evidence was given to prove that, at the time of the civil-bill proceedings, he was dead; and, under these circumstances, the Court of Exchequer held the proceedings void, as *coram non Judice*, and held the plaintiff in the action entitled to recover the possession of the lands, the Assistant-Barrister's jurisdiction being confined to living parties. In that case, it was of course competent for the Assistant-Barrister to inquire as to the person named defendant; he must have been satisfied that process was duly served on him; yet his decease was not considered conclusive. Though the decision of the Court of Exchequer, in *Condon v. Lord Kingston* (a), is against the objection taken to the validity of the proceedings in the Civil-bill Court, namely, as describing the tenancy as one from year to year, it being in fact under a lease, still all the Barons clearly expressed their opinions that the proceedings would have been of no avail, if it had been shown that the relation of landlord and tenant had not existed between the parties; and therefore, though not a decision, it certainly contains a very strong expression of the opinion of the Barons of the Exchequer on the point now before us.

In conclusion, therefore, we are of opinion that the jurisdiction of the Assistant-Barrister is, according to the express provisions of the Act, confined to cases between landlord and tenant, and that, though the Assistant-Barrister must necessarily inquire whether the relation of landlord and tenant exists, yet this is merely a preliminary inquiry, to enable him to know whether he will judicially entertain the case; and that there is nothing in the Act, expressly or by necessary implication, rendering the determination of the Assistant-Barrister in this preliminary matter binding on the parties, and therefore that it was competent for the plaintiffs in the proceedings before us to show, as they have done, that such relation did not in fact exist, and that the proceedings were *coram non Judice*. We further think that the case comes within the principle of the cases to which I have referred, which

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M. T. 1858. have been decided on the Landlord and Tenant Acts ; and therefore *Common Pleas.* that the plaintiffs are entitled to retain the verdict found for them, and that the cause shown must be allowed with costs. I have altogether omitted any reference to *Coffey v. Rahilly* (*a*), reported in *Mr. Jones' Reports*, as the case appears to us to have been decided rather hurriedly ; and we do not make it the foundation of our judgment ; we leave it, just as we find it, to be re-considered, should a similar case again arise. We also refrain from giving any opinion on the case of *O'Donnell v. Ryan* (*b*), in the Court of Exchequer, as to the conclusiveness, in any case, of a judgment in an ejectment on the title.* The learned Barons by whom that case was decided seem to have thought it a fit case for the consideration of a Court of Appeal. Without presuming to give any very strong opinion on the subject, we also will content ourselves with saying that, should that question again arise, we think it will require a very careful consideration whether a judgment in an ejectment on the title is conclusive, as to the rights of the parties.

Cause shown by plaintiffs allowed with costs.

(*a*) 1 Jo. 275.

(*b*) 7 Ir. Jur. 127.

* NOTE.—See now the 19 & 20 Vic., c. 102 (Common Law Procedure Amendment Act, Ireland, 1856), s. 94, with respect to the effect of a judgment in ejectment.

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Jan. 15, 16.

GORMAN v. BYRNE and others.

Lands were conveyed to A and B, and portions of the lands of Busherstown, containing, in the whole, their heirs, to have and to hold the same "from henceforth unto the said A and B, and the survivor of them, their and his heirs and assigns, to the only proper use and behoof of the said A and B, and the survivor of them, their and his heirs and assigns for ever." The settlement contained a power for C, at any time during his life, "by mortgage of all or any part of said lands," to raise £500. C having afterwards mortgaged the lands to D, in fee—*Held*, that, notwithstanding that A and B took at Common Law, and not under the Statute of Uses, the mortgagee, assuming the power to have been well exercised, acquired the legal estate in the lands.

Held, also, that a conveyance in fee by C, to a lessee of the lands, in trust to pay head-rents and rentcharges, and then to retain the residue of the reserved rents until, by perception thereof, he should be repaid the amount of a loan, and interest, with a proviso that the grantor might avoid the deed, on payment of what was due, was a good execution of the above power to mortgage.

ninety-four acres, or thereabouts, demised by the late James Gorman to the defendant Matthew Byrne, by three separate leases, dated respectively the 11th of June 1850, and situate in the barony of Carlow, in the county of Carlow. The principal defendant took defence generally. The action was tried at the Summer Assizes 1857, for the county of Carlow, before MONAHAN, C.J. The facts of the case, as they appeared at the trial, are fully detailed in the judgment of the Court. The principal point at issue between the parties was, whether the rent reserved by the three several leases in question, which had been executed under a leasing power, was the full improved value, as required by the power. But, independently of the affirmative of that question, the defendant insisted that a certain mortgage deed, of the 24th of July 1850, transferred the legal estate in the lands to him, the defendant, and operated as a bar to any recovery in the present ejectment, and that its execution by Sarah Gorman, one of the plaintiffs, operated as a confirmation of the leases. His Lordship, having reserved liberty for the defendant to move the Court above to have a verdict entered for him on the question of law, left the question of value to the jury, who found that the leases had not been made at the full value, and therefore a verdict was directed for the plaintiffs.

In the following Term (November 4), *Macdonogh*, on behalf of the defendant, obtained a conditional order to set the verdict aside, and have a verdict entered up for defendant, pursuant to leave reserved, upon the grounds taken at the trial, or for a new trial.

Cause was afterwards shown against making the same absolute, by *Hayes* and *J. T. Ball*.

Macdonogh and *Hamilton Smythe* (with whom was *J. A. Byrne*), in support of the conditional order.

The following cases were cited during the progress of the arguments of Counsel, the nature of which sufficiently appear from the judgment of the Court: 1 *Sug. Powers*, 7th ed., pp. 168-9, 414, 497; 1 *Sanders' Uses*, 5th ed., pp. 163-9; *Bacon's Law Tracts*, p. 352; *Burton Real Prop.*, 6th ed., p. 55; *Doe v. Prest-*

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Cur. ad. vult.

E. T. 1858. MONAHAN, C. J., now delivered the judgment of the Court.
May 4.

This was an ejectment upon the title, brought to recover three several parcels of the lands of Busherstown, and was tried before me, at the last Carlow Summer Assizes. It appeared that the three denominations had been originally demised to the ancestor of the late James Gorman, by three several leases, the first of which was a fee-farm grant, subject to a yearly rent, and the second and third denominations were likewise held by James Gorman, upon leases for lives. By an indenture of settlement, dated the 31st of May 1825, executed upon the marriage of James Gorman, and reciting that the settlor was seised of certain lands in fee-simple; also of one denomination of the lands of Busherstown, held under a fee-farm grant, and two other denominations of the same lands, held under terminable leases, and also reciting the contemplated marriage, and that a fortune was to be given

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| (a) 4 M. & S. 183. | (b) Gilb. Eq. Rep. 17. |
| (c) Cro. Jac. 244. | (d) Cro. Jac. 250. |
| (e) Hutton, 112. | (f) 13 Rep. 54 b. |
| (g) 1 M. & G. 129 n. | (h) 1 Str. 106. |
| (i) 1 Salk. 90. | (k) 3 Salk. 51 n. |
| (l) 6 B. & C. 316. | (m) Cited 1 Sug. Powers, 169. |
| (n) 1 Ven. 194. | (o) 1 Ad. & El. 589. |
| (p) 2 B. & B. 35; S. C., on Appeal, in <i>Dow. Proc.</i> , 4 Dow. P. C. 248. | (r) Hard. 397; 1 Chan. Cas. 103. |
| (q) Skin. 427. | (s) 5 B. & Ad. 361-5; S. C., in Equity, 5 Madd. 310. |
| (t) 10 Ves. 255. | (u) 6 East, 86. |
| (v) 1 Rep. 120. | |

with his intended wife, he conveys the three several denominations of Busherstown, and also the lands held by him in fee-simple, to Timothy Gorman and Patrick Ronayne, the trustees of the settlement, to have and to hold the same "from henceforth, unto the said "Timothy Gorman, party hereto, and Patrick Ronayne (the trustees) and the survivor of them, their and his heirs and assigns;" that is to say, the fee-simple lands and the fee-farm portion of the lands of Busherstown, "to the only proper use and behalf of the said "(trustees), and the survivor of them, their and his heirs and assigns "for ever; and as to the lands held on the terminable leases, "for and during the natural lives and life of the several and respective *cestui que vires* and *cestui que vie* hereinbefore named, and "for whose lives and life the same are respectively held as aforesaid, "and the survivors and survivor of them, subject to the several "and respective yearly rents," &c. The settlor then proceeds to declare the uses with respect to all these denominations; namely, to the use of himself for life, then to pay an annuity to his widow in lieu of dower, &c., and, subject thereto, to the use of the issue of the marriage, in the shares directed by the settlement. The settlement contained two powers in the following terms; first, "That "it shall and may be lawful, to and for the said James Gorman, "at any time during his life, by mortgage of all or any part of "said lands, save the lands of Phrumplestown, to raise the sum "of £500 for his own use, anything in these presents notwithstanding, without prejudice, however, to the jointure so hereinbefore charged thereon, for the said Eliza Love (his intended "wife); and, secondly, that "It shall and may be lawful, to and "for the said James Gorman, and to and for all and every other "person and persons who shall, under and by virtue of the limitations herein contained, be entitled to the said lands and premises, "hereby granted and released, when and as they shall respectively "be in possession thereof, and to and for the said (trustees) and the "survivors of them, their and his assigns, during the minority of "any child or children, issue of the said intended marriage, by "indenture or indentures under hand and seal, to demise, lease, "release and set the whole or any part or parts of the said several

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E. T. 1858. "and respective lands and premises, and to accept surrenders of the
Common Pleas. "present or any future lease or leases thereof, to be reserved and
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"be then reasonably had or gotten for the same, without fine, and so
"as the term or terms thereby granted commence in possession, and
"not in reversion, and be consistent with the estate and interest
"of and in the premises to be hereby demised, and so that the
"lessee or lessees do execute, seal and deliver a counterpart or
"counterparts of such leases," &c., &c.

We may observe that the former power extends to the raising of any sum not exceeding £500, by way of mortgage; on the other hand, the leasing power is unlimited, as to the term, provided it be consistent with the estate in the land; but the rent must be the best improved rent. It appears that the marriage took effect; and James Gorman, being tenant for life in possession, upon the 11th of June 1850, executed three several leases to the defendant Byrne, of the lands demised by the three several deeds under which the lessor had held same. I have not by me copies of these leases, but they are all for long terms, and are tantamount to an alienation of the entire interest, subject only to the reserved rent; they were likewise executed by the lessee, pursuant to the terms of the power; so, in point of fact, they are in apparent conformity with the terms of the power, which stipulated only for the reservation of the best improved yearly rent. A mortgage was likewise executed by Gorman on the 24th of July 1850, with the assent of his daughters, one of whom executed the deed. The mortgage recites that leases were made by Gorman to Matthew Byrne; also that, at the time of the execution of the leases, an agreement had been made by Gorman and his two daughters, in order to secure repayment to Byrne of an old debt of £90, and a then further advance of £100, that they should convey the profit-rent of the premises to Byrne, by way of mortgage, until he should be repaid his advance, together with interest. The deed then recites that, in pursuance of the articles, Gorman had been called on to execute the mortgage; and it witnesses that James Gorman, in pursuance of the agreement, and with the assent of his daughters,

testified by their being executing parties thereto, conveyed to the said Matthew Byrne, his heirs and assigns, the aforesaid three several portions of the lands of Busherstown, in the first place to pay the head-rent of the lands; secondly, the tithe rentcharge, and lastly, after payment thereof, "to retain the residue of the rent reserved and made payable by the aforesaid three several indentures of lease, until, by perception of the said residue or profit-rent, he the said Matthew Byrne, his heirs, executors or administrators, shall be duly paid the said sum of £190, together with interest thereon at the rate of £6 per cent. per annum, from the day of the date of the said recited articles of agreement: provided always, that it shall and may be lawful, to and for the said James Gorman, his heirs, executors or administrators, at any time to pay off the sum due to the said M. Byrne, or any balance thereof, and, after payment thereof, then these presents to be null and void." The deed also contained a provision for the re-conveyance of the premises by M. Byrne, upon repayment to him of the advances.

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The case came on for trial before me; and, according to the opening statement of Counsel, it appeared that the ejectment was brought to evict the three leases, and that the only question was, whether the leases had been duly executed, according to the leasing power, so as to bind those in remainder? The principal plaintiffs were Catherine and Sarah Gorman, the issue of the marriage, their father being deceased; there were also two other plaintiffs, namely, Timothy Gorman and Patrick Ronayne, the trustees of the settlement. A vast body of evidence was produced on behalf of the plaintiffs, to show that the best rent had not been reserved, and that coercion and undue influence had been employed, Gorman having been in distressed circumstances, and having borrowed money from Byrne. The case of the defendant was, that the transactions on his part were perfectly fair—that the rents reserved were the full value of the land—that the loan of the £190 was a fair transaction, and that the leases were unimpeachable. The trial lasted two days. On the evening of the second day, Counsel on both sides raised points of law. Upon the part of the plaintiff, I was called upon to direct

E. T. 1858. the jury that, according to the true construction of the marriage
Common Pleas. settlement, the tenant for life had not power to make leases, the
legal estate being alone vested in the trustees, and that the verdict
accordingly should be for the plaintiffs. On the other hand, the
defendant insisted that there was no question to be tried—that the
leases were perfectly valid, and that, at all events, the mortgage was
in pursuance of the power; and as, by the mortgage, the defendant
had got a legal estate, the plaintiffs could not, in a Court of Law,
sustain this ejectment. It was to be regretted that the parties did
not raise these points at an earlier stage of the trial. I, however,
determined to leave the question to the jury, whether the leases
were in point of fact executed in conformity with the leasing power?
After a long investigation, and after hearing speeches from Counsel
on the point, they found that the leases were not in conformity with
the leasing power, stating their opinion to be, that the rent was not
the best improved rent; and, having regard to all the circumstances
of the case, and that Byrne had used undue influence to obtain same,
I then, without considering the questions of law, by consent of both
parties, directed a verdict in favour of the plaintiffs, but reserved
leave for the defendant to have one entered for himself, as to the
whole of the lands, in case the Court should be of opinion that he was
so entitled. The defendant has accordingly obtained a conditional
order, to have the verdict entered for himself, pursuant to the leave
reserved, upon the ground that the mortgage having been executed
pursuant to the power in the settlement, the defendant has the legal
estate in the lands. The plaintiffs, in showing cause against the
conditional order, insisted that, under the settlement of 1825, the
legal estate in the fee-farm lands was vested in the trustees, and that
the execution of the mortgaging power by James Gorman could not
create a legal estate in Byrne, so as to divest the legal estate vested
in the trustees of the settlement. For that purpose, they relied on
the passage in *Co. Lit.*, 287 a:—"Lastly, somewhat were necessary
"to be spoken, concerning clauses of proviso containing power of
"revocation, which, since *Littleton* wrote, are crept into voluntary
"conveyances, which pass by reason of uses being executed by the
"statute of 27 Hen. 8, and are become very frequent, and the inhe-

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"ritance of many depend thereupon : as, if a man seised of lands "in fee, and having issue divers sonnes, by deed indented cove-
 "nanteth, in consideration of fatherly love, and for the advancement
 "of the blood, or upon any other good consideration, to stand seised
 "of three acres of land, to the use of himselfe for life, and after to
 "the use of Thomas, his eldest son, in tail, and, for default of such
 "issue, to the use of his second son, in tail, with divers like remain-
 "ders over, with a proviso that it shall be lawful for the covenantor,
 "at any time during his life, to revoke any of the said uses, &c., this
 "proviso, being coupled with an use, is allowed to be good, and not
 "repugnant to the former estates. But, in case of a feoffment or
 "other conveyance, whereby the feoffee or grantee, &c., is in by
 "the Common Law, such a proviso were merely repugnant and
 "void." Accordingly, the plaintiffs' Counsel have contended that
 the trustees have acquired the legal estate in the lands held under
 the fee-farm grant—that they are in thereof at the Common Law,
 and that, inasmuch as they have both the legal estate, and have
 taken it at Common Law, and not by force of the Statute of Uses,
 the passage in *Co. Lit.*, to which I have referred, is an authority
 to show that any such provision or power, as in the present case,
 for transferring the legal estate, was repugnant to the conveyance
 itself, and consequently void. Several cases have been referred
 to in the course of the argument, which it is not necessary to
 advert to here, having been cited to prove what cannot be con-
 troverted; namely, that the trustees take, in the premises comprised
 in the fee-farm grant, the legal estate, the limitation being to them
 and their heirs, to the use of them and their heirs, upon trust, &c.
 To establish this proposition, the case of *Doe d. Lloyd v. Passingham* (a) is a sufficient authority; in which case it was held that,
 under a conveyance, by which lands were conveyed to A B and
 C D, and their heirs, to the use of them and their heirs, in trust
 for E F, though the trustees took at Common Law, and not under
 the Statute of Uses, still that E F took only a trust, and not a
 legal estate executed by the statute. We cannot distinguish that

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(a) 6 B. & C. 305.

E. T. 1858. case from the present, and therefore are of opinion that the *Common Pleas.* trustees, Gorman and Ronayne, took the legal estate in the fee-farm lands, which are one of the parcels the subject of this ejectment, and that they took the same at Common Law, and not under the Statute of Uses, which applies only to the case of one person being seized, to the use of another, and not to his own use.

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But the question then arises whether, though the trustees have the legal estate, and that at Common Law, does the passage in *Co. Lit.*, 237 a, to which I have referred, apply to the present case, and if it do, whether, on the authority of that case, we should hold that the power to mortgage is void, for the purpose of conferring a legal estate? As bearing on this part of the case, the plaintiffs' Counsel referred to *Long v. Buckridge* (a). That was an avowry of a distress for a fee-farm rent, the avowant claiming as devisee of a party who was entitled to the rent, under a fine levied to him and his heirs. There was a demurrer to the avowry, no attornment having been alleged. The point made upon the other side was, that the party was in under the Statute of Uses, and consequently that the well-known principle applied, that in such a case it was not necessary that there should be an attornment. The Court allowed the demurrer, upon the ground that the party was in at Common Law, and not by the Statute of Uses. On looking into that case, it occurs to me that the Court held that the conusee was in by virtue of the fine itself, and not by the declaration of uses to him, which merely prevented a resulting use in favour of the conusor. So, in this case, we think that though the trustees have the legal estate, and are in at Common Law, it is by the grant of the lands to them they are so seized, and not by the limitation of the use, which confers no estate at all, but merely prevents a resulting use to the grantor; and I confess that, even if there were no authority upon this point, I would consider it more consistent with principle to hold that the passage in *Co. Lit.* refers to simple Common Law conveyances, such as leases or feoffments for value, where the feoffee takes without any declaration of uses, and not to conveyances like the

(a) 1 Str. 106.

present, where a declaration of the use in favour of the grantee is necessary, to prevent a resulting use in favour of the grantor; and that the elaborate argument of *Sir E. Sugden* on this point (*1 Sugden on Powers*, pp. 162-71, 7th ed.) is more convincing than the equally elaborate, but I should say not so satisfactory, argument of Mr. *Sanders* on the same subject (*1 Sand. Uses*, pp. 165-9). But I consider that that question is concluded in point of authority. In *Sir Ralph Bovey's case* (a), Sir William Drake enfeoffed Sir William Spring and five others, to such uses as he should declare by his will in writing, or by his deed, subscribed by three witnesses; by a subsequent deed, he limited the use of the lands to his brother Francis Drake, for ninety years, and declared that the feoffees should be seised to their own use, in trust for the said Francis Drake and his heirs, with a power to Francis Drake to alter and limit the trust as he should think fit. There were several points determined in that case which have no relation to the present, but, in the course of it, the Court resolved that when Sir William Drake enfeoffed divers to such uses as he should declare by his will in writing, if he had, in pursuance of that feoffment, limited the uses by his will, the will had been but declaratory, though, if he had made a feoffment to the use of his will, it had been otherwise, according to *Sir Edward Cleer's case* (b). No doubt, that case may be distinguished from the present, because there was no direct limitation to the use of the trustees, in the first instance; but in the course of the argument of the case, Lord Hale said:—

“ My Lord Coke made a feoffment (provided that he might dispose “ by his will) to the use of the feoffee and his heirs, and resolved “ that, in that case, he might declare the use by his will, which “ would arise out of the feoffment.” If that case be good law, it does not appear to us to be distinguishable from the present. No doubt, in Sir E. Coke's case, the feoffee was in at Common Law until the use was declared by the testator's will; and the fact that the proviso or power preceded the limitation of the use could not make any difference. In the case before us, the limitation is to the use of the trustees and their heirs, with power to the grantor to

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E. T. 1858. lease and mortgage; that is to say, to such uses as he shall declare
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 BYRNE. divest that estate by leasing or mortgaging, to the use of the trustees
 and their heirs. While such was the state of the authorities, the
 argument took place between *Sir Edward Sugden* in his book
on Powers, and Mr. Sanders in his *Treatise on Uses and Trusts*;
 and subsequently thereto there occurred the case of *Moreton v. Lees* (a). That case is referred to in 1 *Sugden on Powers*, p. 169,
 7th edition, in these terms:—"Since these observations were pub-
 "lished, it has been decided that the power is, in the disputed case,
 "well raised. The conveyance in this case, on which the point was
 "decided, was, by feoffment to the purchaser, his heirs and assigns,
 "to such uses as he should appoint by deed or will, and, in default
 "of and until appointment, to the use of the purchaser, his heirs
 "and assigns. He exercised the power by an appointment in fee,
 "and his wife brought an action to recover her dower. The
 "objection was taken that the husband was in at Common Law,
 "and that the power was void; but the contrary was decided, and
 "the wife held to be barred of dower. This decision, therefore,
 "sets the point at rest." Since that case, no one similar has arisen
 until the present. In this opinion we concur, and think that it is,
 at all events, too late now to unsettle the law, as settled by this
 last case, which has been acquiesced in and recognised, and, as far
 as we are aware of, unquestioned, by holding that this power to
 mortgage was not capable of being exercised so as to vest the legal
 estate in the mortgagee. We are therefore of opinion that it was
 competent for James Gorman to execute the power of mortgaging,
 so as to clothe the mortgagee with the legal estate. The only
 remaining point made by the Counsel for the plaintiffs was, that the
 mortgage in the present case, being a conveyance of the lands, not
 in *quasi* fee, subject to redemption, as in the case of ordinary
 mortgages, but until, by retention of the profit-rent, the amount due,
 with interest, should be paid off, was not a good legal execution of
 the power. The only case referred to on that subject is *Marnell*

(a) Com. Pleas Lancaster, March Assizes 1819; argued afterwards,
 coram Richards, C. B., and Wood, B., at Serjeants' Inn.

v. *Blake* (a), which was an appeal from the Court of Chancery in Ireland; in which case it is stated, by Lords Eldon and Redesdale, that a grant of an annuity, till by perception thereof a given sum and interest was discharged, though a good equitable, would not be a good legal, execution of the power to charge. That was a very peculiar case, in which the settlement, from the way in which it was prepared, did not grant any legal estate, but was merely an equitable settlement, resting on articles of agreement. There was an express clause that though the tenant for life was to have power to charge, he was to be disabled from selling or mortgaging, and it certainly cannot be considered as a decision that, under a regular settlement giving power to raise a sum of money by way of mortgage, the same cannot be legally executed by the grant of an annuity. The observations of Sir E. Sugden, upon that case, in his book on the *House of Lords Decisions*, are well worthy of attention (pp. 483-6). But be that as it may, this is not the case of the grant of an annuity, but of the lands, until by receipt of the rents the debt shall be paid, with an express provision enabling James Gorman, and those deriving under him, at any time to redeem by paying the balance due. This is strictly a Welsh mortgage, and therefore within the general terms of the power in the present case.

On the whole, therefore, we are of opinion that the mortgage in question conveyed the legal estate in all the premises to the defendant, and that the plaintiffs have mistaken the Court for obtaining redress, which can only be had in a Court of Equity. We must therefore make absolute the conditional order for entering a verdict for the defendant, but each party must abide their own costs of this motion.

Rule absolute, to enter a verdict for defendant, without costs.

(a) 4 Dow. 248.

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GUARDIANS OF TRIM UNION v. DARCY.

May 10.

An action for penalties, under the 11 and 12 Vic., c. 47, s. 6, can be brought in the Superior Courts of Common Law in Ireland, although the defendant resides within the jurisdiction.

THIS was an action of debt, for a penalty incurred by breach of the 11 & 12 Vic., c. 47. The first count of the summons and plaint alleged that at the time of, &c., the defendant was the owner of certain lands, being a portion of the townlands of Galtrim, in the barony of Lower Decece, in the county of Meath, and in the electoral division of Galtrim, of the Poor-law Union of Trim, on which the offence thereafter mentioned was committed. It then alleged that defendant caused a certain decree, order or process of the Court of Chancery to be issued forth, and directed to the Sheriff of Meath, ordering him to deliver up to the defendant possession of the said lands, and to dispossess and evict therefrom certain persons who were in occupation of a dwelling-house therein, and which house was inhabited by them as a dwelling-house within said union and electoral division ; which process he caused the Sheriff to execute, whereby the said persons became destitute poor persons within the meaning of said statute, and to deliver up possession of said house, whereby said persons were forced to apply for relief to the relieving officer of said electoral division in which said house was situate, and became chargeable and relieveable as destitute poor persons upon said division of said union, and were relieved, &c. It then averred that it became and was the duty of defendant, or his agent, within not less than forty-eight hours before the execution of such decree, &c., to give the notice to the relieving officer of the said electoral division, required by the statute ; but that he caused the decree, &c., to be executed, and the parties to be evicted, without giving the proper notice, whereby an action hath accrued to the plaintiffs as such guardians, &c., to demand and have from the defendant, and whereby he forfeited and became liable to pay to the said guardians, the penalty or sum of £20. There was a second count, omitting the allegation that the persons

dispossessed thereby became destitute poor persons, and were forced to apply for relief. The first defence alleged that, before and at the time of the issuing of the Chancery process in question, under which the possession of the lands mentioned in the first and second counts of the summons and plaint was given to the defendant, and from thence hitherto, the defendant is resident in Ireland, to wit, at Kilglass, in the county of Kildare, and during no part of the time aforesaid had the defendant been resident out of Ireland; and that the defendant, before and at the time of the alleged offences in the several counts of the summons and plaint, was, and from thence hitherto hath been, and still is, amenable to the process of the proper Civil-bill Court. To this defence the plaintiffs demurred, upon the ground that it tendered an immaterial issue.

O'Driscoll and *Battersby*, in support of the demurrer, contended that the words of the 6th section of the 11 & 12 Vic., c. 47 (by which penalties are given for the default alleged in the summons and plaint), "such sum may be recovered by civil-bill or otherwise," applied to actions in the Superior Courts as well as in the Civil-bill Court. They cited *Daniel v. Bingham* (a); *Williams v. Jones* (b); *Berkeley v. Elderkin* (c); *Moffatt v. Burrowes* (d); *Bentley v. Hastings* (e); *Sharp v. Warren* (f); *O'Donnell & Brady, Civil-bill Practice*, p. 318.

J. A. Byrne and *H. Smythe*, in support of the plea, contended that the words "or otherwise" had reference to the preceding words, and that the remedy was expressly confined to the Civil-bill Court, unless the landlord was resident out of the jurisdiction, in which case the next clause of the section allowed the penalty to be recovered by action at Law, and provided for substitution of service. They cited *Watkins v. Great Northern Railway Co.* (g);

(a) 7 Ir. Law Rep. 33.

(b) 13 M. & A. 628.

(c) 1 El. & Bl. 805.

(d) 4 Ir. Com. Law Rep. 207.

(e) 8 Ir. Law Rep. 166.

(f) 6 Pri. 133.

(g) 16 Q. B. 961.

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BALL, J., delivered the judgment of the Court.

In this case we have heard the arguments at considerable length, on a subject upon which the law is now to be judicially considered for the first time. At least we are not aware of, nor have we been referred to, any case in which the same question has come before any Court for its decision. The whole difficulty arises from the use of the words "or otherwise," in the 6th section of the 11 and 12 Vic., c. 47. It is enacted by that section, "That in case the "landlord or other person, by whom or on whose behalf such writ, "decree, order, or other process (as thereinbefore mentioned) shall "have been sued out, shall neglect or omit to serve the notice "required by that Act to be served on the relieving officer, he "shall forfeit and pay the sum of £20 to the guardians of the "union in which the land shall be situate; and such sum may "be recovered by civil-bill *or otherwise*, and shall be applied in "aid of the electoral division in which such land shall be situ- "ate; and in case such landlord or other person shall be resident "out of Ireland, the same may be recovered from him by action "at Law; and the service of process in such action on the attorney "or agent, by whom such writ, decree or order, or other process "may have been sued out, shall be good service on such landlord "or other person as aforesaid."

Now we are bound to give to the words in this clause "or otherwise" a reasonable construction, if they admit of it. We are not to qualify, alter, or transpose them without necessity; and we do not find that there is necessity for so doing. We construe them according to their natural import, by holding that these words "or otherwise" signify "by all other means which the law allows in such cases;" and as an action at Law is one of the remedies for the recovery of penalties imposed by statute, we hold

(a) 2 C. B., N. S., 211.

(b) 3 T. R. 442.

(c) 1 El. & Bl. 667.

(d) 11 Q. B. 731.

the present action to be sustainable, by virtue of those words "or otherwise." E. T. 1858.
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We are not called upon to say what other remedies might or might not be resorted to; but we merely hold that these words give to the guardians of the poor the right to proceed at law (as they have done on this occasion), for the recovery of the penalty which the defendant has incurred. But we have been pressed at the Bar with the difficulty of giving this construction to the words "or otherwise," by reason of the subsequent words in the clause, which give a remedy by action against landlords resident out of Ireland; and it has been urged that such a provision would have been unnecessary if the preceding words, "or otherwise," were to be construed to give a remedy by action in all cases, whether the landlord resides out of Ireland or not. There would be great force in the observation if, at the time of the enactment of the 11 & 12 Vic., c. 47, a landlord out of Ireland could be *effectually* proceeded against in an action at Law for the recovery of the penalty thereby imposed. But inasmuch as, by the law as it then stood, service of process on a defendant out of the jurisdiction could not be substituted, the right to bring an action in such a case, without a provision for the substitution of service, would have been nugatory; and accordingly, it was enacted, in terms, by the latter part of the clause, that in the case of a landlord residing out of the jurisdiction, not only might an action at Law be brought against him for the recovery of the penalty (as already provided by the terms "or otherwise"), but service of the process in such action might be substituted in the manner therein mentioned; the statute thus providing that the action at Law should be an effectual, and not merely a nominal, remedy for the recovery of the penalty. The whole clause is thus susceptible of a reasonable construction; and however more satisfactorily the clause might have been prepared, we consider it sufficiently clear in its terms to warrant the construction which we have thus put upon it. Therefore, upon the whole, we think that the demurrer to the defence must be allowed.

Demurrer allowed.*

* MONAHAN, C.J., was at Nisi Prius.

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 Dec. 2.*

S. K., being seized in fee-simple of a several portion of the lands of C., devised same specifically to G. S. and his heirs. Subsequent to the date of her will, she purchased the other several portion of C., in fee. It appeared that both portions had originally formed one entire demarcation, and, having come into the possession of tenants in common, had been apportioned between them in severality; but both portions continued to be known as the lands of C., although commonly called, in addition thereto, for the sake of distinction, by the names of their respective owners at the time of partition. R. B. was the residuary devisee of S. K.—*Held*, that under the 1st Vic., c. 26, ss. 3 & 24, the lands subsequently purchased passed to G. S., the specific devisee of C., and not to the residuary devisee.

This was an ejectment on the title, brought to recover the lands of Curramore. At the trial of the cause, at the last Summer Assizes for the county of Roscommon, before Knock, J., the plaintiff gave in evidence the will of Mrs. Sarah Kelly, dated the 7th day of August 1854, by which she made the following devise, viz.:—
 “I give, devise and bequeath to the said George Strevens (the plaintiff), and to his heirs and assigns for ever, the lands of Curramore, Carricknagott and Curaghelaher, in the county of Roscommon, with their subdenominations, and all my estate, right, title and interest therein or thereto, and to every part thereof, and the rents, issues and profits thereof, for his and their own use and behoof for ever.”

The will also contained the following residuary clause:—“And I do hereby give, devise and bequeath all the rest, residue and remainder of my property, of every kind and description whatsoever, real, freehold, leasehold, chattel and personal, to my nephew Robert Preston Bayley, his heirs, executors, administrators and assigns, for his and their own absolute use and behoof for ever.”

The plaintiff also gave in evidence a conveyance from the Incumbered Estates Commissioners, bearing date the 8th of December 1855, of the lands of Curramore; also a consent, dated the 3rd of July 1858, and certain deeds therein specified, by which it appeared that the estate of Curramore, of which Mrs. Kelly was in possession at the date of her will, had been formerly held in undivided portions, with the estate of Curramore, purchased by her after the date of her will; but that there had been a writ of partition, and judgment duly entered thereon in 1780; that Mrs. Kelly's late husband, to the residuary devisee.

under whom she claimed, had purchased the lands of Curramore, of M. T. 1858.
which she was seized at the date of her will, many years previous *Common Pleas.*
to his own death. A demand of possession was also proved.

STREVENS

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The plaintiff called upon the learned Judge to direct a verdict for him, upon the ground that the testatrix had died seized of the lands of Curramore, the subject of the ejectment. His Lordship signified his assent to the view put forward by the plaintiff's Counsel, on the ground that the will was to speak from the day of the death of the testatrix, and that no contrary intention appeared in the will; but permitted the defendant to give in evidence, subject to objection, the banker's draft given by Mrs. Kelly in payment of the purchase-money in the Incumbered Estates Court, and some other documents, by which it appeared that the testatrix called and treated the estate she had so purchased as Curramore (Carter) as distinguished from the other portion known as Curramore (Bingham).

On the part of the defendant, Counsel called on the learned Judge to tell the jury that the Curramore acquired subsequently to the will did not pass by it; that a new subject-matter was acquired, and not a change in the interest of a former; that as to the description of the property, the will spoke as from its date; but as to the devise of the property so described, it spoke from the death; that, in another view, there was a latent ambiguity, and, therefore, there was a question for the jury, as the testatrix treated the subsequently acquired property as a distinct denomination, and so considered it. His Lordship, however, directed the jury to find for the plaintiff, reserving liberty to the defendant, if the Court above should be of opinion that his direction was wrong in any particular, and upon any objection that might be made against it, to move to change the verdict, and also, with power at any stage of the proceedings to put the question on the record.

West, on the 3rd of November, obtained a conditional order to set aside the verdict, and to enter a verdict for defendant, on the ground of misdirection, pursuant to leave reserved.

M. T. 1858. *Robinson and Lawson*, now showed cause, on behalf of the plaintiff, against making absolute the conditional order.

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The following cases were cited: *Doe d. Yorke v. Walker* (a); *Emus v. Smith* (b); *Cole v. Scott* (c); *Lady Langdale v. Briggs* (d); *Goodlad v. Burnett* (e); *Webb v. Byng* (f); *Bullock v. Bennett* (g); *Douglas v. Douglas* (h); *Banks v. Thornton* (i); 11 *Jarman Conveyancing*, by Sweet, p. 459, n. a; 1 *Jarman on Wills*, pp. 270-1.

Cur. ad. vult.

MONAHAN, C. J.

Dec. 2.

This was an ejectment on the title, tried at the last Roscommon Assizes, before my Brother KEOGH, and brought by the plaintiff Strevens, to recover possession of the lands of Curramore, in that county, from the defendant Bayley. It appeared, partly by the admission of the parties, and partly by the evidence at the trial, that previous to the year 1780, a certain denomination or townland called Curramore was the fee-simple property of two persons named Bingham and Carter; and in the year 1780, a partition was made between them—one part of the lands having been apportioned and conveyed in severalty to Bingham, the other to Carter. A map was given in evidence, showing the property to have been circumstanced as I have stated. It further appeared that, after that partition, in December 1792, the late Mr. Edmond Kelly purchased the portion of those lands which had been allotted to

(a) 12 M. & W. 591. (b) 2 De G. & Sm. 723.

(c) 1 M'N. & G. 518.

(d) 2 Sm. & Gif. 246; S. C., 26 Law Jour., N. S., Chan., 489.

(e) 1 K. & J. 341.

(f) 1 K. & J. 580.

(g) 7 De G., M'N. & G., 283.

(h) 1 Kay. 400.

(i) 11 Hare, 176.

the Bingham family, and same were conveyed to him by the description of Curramore Bingham ; that after the death of Edmond Kelly, which took place several years since, Sarah Kelly, his widow, under his will became entitled to the whole of his landed property, including the portion of the lands of Curramore, so purchased from the Bingham family ; and in that state of facts she made her will, dated the 7th of August 1854, by which she disposed of several distinct properties to different persons, and, among others, she left to the plaintiff Strevens three several denominations of land, in the following words :—“ I give, devise and bequeath to “ the said George Strevens the younger, and to his heirs and assigns “ for ever, the lands of Curramore, Carricknagott and Cuareaghela- “ her, in the county of Roscommon, with their subdenominations ; “ and all my estate, right, title and interest therein or there- “ to, &c., &c., for his and their own use and behoof for ever.”

There are several other specific devises of other denominations of land in the will, and a residuary clause in these words :—“ And “ I do hereby give, devise and bequeath all the rest, residue “ and remainder of my property, of every kind and description “ whatsoever, real, freehold, leasehold, chattel or personal, to my “ nephew Robert Preston Bayley, his heirs, executors, adminis- “ trators and assigns, for his and their own absolute use and “ benefit for ever.”

We have looked at the other portions of the will, but they do not appear to us in any way to affect the construction of the principal clause in relation to this property. It appears that, after the making of her will, Mrs. Kelly, who was, as I have stated, in possession of one portion of these lands, purchased the other portion, that is, the Carter portion, in the Incumbered Estates, and same were conveyed to her by the description of “ The lands of Curramore ;” but by the map attached to that conveyance, it appears that this purchase related only to Carter’s portion of these lands. The testatrix subsequently, on the 8th of April 1856, died seised of both portions of those lands ; and the present dispute is, whether both these portions of land passed under the specific devise in the first portion of the will to Strevens the plaintiff, or

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M. T. 1858. whether the part purchased by Mrs. Kelly since the execution of
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her will passed to the defendant, Mr. Bayley, under the residuary
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BAYLEY. No further evidence of any description appears to have been given at the trial, with the exception of certain cheques drawn by Mrs. Kelly for the purchase-money of the lands, and by an indorsement or memorandum on which she describes them as drawn for the payment of the purchase-money of Curramore (Carter). These documents were tendered in evidence by the defendant, and objected to by plaintiff's Counsel as inadmissible. The ruling which my Brother KEOGH made was, that he would reserve the question for this Court as to whether they were properly receiveable in evidence? If the Court should be of opinion that they ought not to have been received, that they should be considered as having been rejected, and that the case should be considered without reference thereto; but that, if they were properly receiveable in evidence, that they should be considered as having been so received. We see no objection to their reception. Taking them and the conveyance together, it appears that the lands were conveyed to Mrs. Kelly as Curramore; she paid for them as Curramore Carter.

The question now is, whether those lands, so purchased by Mrs. Kelly after the execution of her will, passed by the devise to the plaintiff Strevens? There can be no doubt, if they did not pass to him by the specific devise, they did so to the defendant under the residuary devise. This question arises on the recent Wills Act, the 1 Vic., c. 26. The two sections of that statute which govern the present question are the 3rd and 24th. The 3rd section declares that the power of disposition shall apply "to such of the same "estates, interests and rights respectively, and other real and "personal estate, as the testator may be entitled to at the time "of his death, notwithstanding that he may become entitled to "the same subsequently to the execution of his will." The 24th section provides—"That every will shall be construed with re- "ference to the real estate and personal estate comprised in it, "to speak and take effect as if it had been executed immediately

"before the death of the testator, unless a contrary intention shall appear by the will."

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Some question has arisen as to what is the meaning of these words, "with reference to the real and personal estate comprised in it." We think that in *Lady Langdale v. Briggs* (a), Lord Justice Turner gives the true interpretation. He there says:— "The words of the section, which I have already read, and which require a little observation, are, 'That every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.' The first question is, what is the meaning of the words, 'with reference to the real and personal estate comprised in it?' The strict and literal meaning of these words, standing by themselves, would perhaps be with reference to the real and personal estate then actually comprised in the will; but it is plain that this was not the intention of the Legislature, for the context shows that the enactment had reference to property not then actually comprised in the will. No doubt that, if the meaning of this clause were to refer only to property comprised in the will, the clause would have no operation at all. This meaning, then, being excluded, is there no other meaning which can be attached to the words, without any violence to them? I think there is, and that the true meaning of the words is, so far as the will comprises dispositions of real and personal estate, a meaning which it is to be observed falls within the context, that to this extent the will is to speak and take effect as if executed immediately before the death." This is illustrated by the case of *Bullock v. Bennett* (b), wherein a distinction is taken between the objects of the testator's bounty and the real and personal estate, which is intended to be taken by those objects. The facts of that case were, the testator had a daughter, who, at the date of the will, was a widow, having been twice married. By his will, dated after the Wills Act, the testator left a sum of stock, upon trust to pay the

(a) 26 Law Jour., N. S., Chan., 489; S. C., 2 Sm. & Gif. 246.

(b) 7 De G., M'N. & Gor. 283.

M. T. 1858. income to her for her life, or until her marriage, and, after her decease
Common Pleas. or her marriage, whichever should first happen, upon trust for her
children by both her late husbands. After the date of the will, the
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of the testator, who died without republishing his will. The question
then arose as to whether the daughter took any interest under the
will. Vice-Chancellor Wood held that the clause in the will was
to be read in relation to her, as if it provided for the occurrence
of the event after the testator's own death, and that her marriage in
his lifetime did not disentitle her to the property. On appeal, Lord
Justice Turner held that it was not so, but that she took nothing
under the will, and that that instrument spoke from the testator's
death only, as to the property comprised therein, and not as to the
circumstances under which the devisees were to take the property.

One of the first cases which arose shortly after the passing of the
Act is a very strong authority to show that the operation of the
Act is not confined to general residuary devises, but that same also
applies to specific devises. The case to which I refer is *Doe v.
Walker* (a); in which the testator, by will dated the 20th of February
1837, before the Act came into operation, devised all his lands,
messuages, &c., which he was seized of or entitled to, in possession,
reversion, remainder or expectancy, in the parish or lordship of
Great Bowden, to certain trustees, upon certain trusts therein par-
ticularly mentioned. By other clauses in the will he devised other
property to the same trustees for different uses. On the 20th of
February 1838, being after the Wills Act came into operation,
testator made and published a codicil to his said will, by which he
recited at length the devise of the lands in Great Bowden and
the other devises, and his intention to appoint an additional trustee.
He devised all the said lands by name to the new trustee, as if
he had been in said will a trustee jointly with the others, and in
all other respects he ratified and confirmed his said will. This was
certainly a case of great peculiarity and some difficulty. The
question was, whether some parcels of lands in Great Bowden,
purchased by the testator after the date of the codicil, passed, with

the other lands in Great Bowden, of which testator was seized when making his will. As against this construction, it was argued with great force that, by the codicil, testator intended nothing to pass except what had been devised by the will. The Court, however, held that the effect of the codicil, particularly the part confirming the will in all other respects, was to make the will speak as if then executed; and thus reduced the question to this, what is the effect, since the Wills Act, of a devise of all one's lands in a particular locality? and the Court held the effect to be to pass subsequently acquired lands in that locality, there being nothing on the face of the will to show a different intent, though it was equally true that there was nothing in the will itself to show an intent on the part of the testator that subsequently acquired lands should pass.

The case of *Cole v. Scott* (a) was for some time thought to have been not quite consistent with *Doe v. Walker*. There the terms of the devise were, "all the freehold, copyhold and leasehold estates whereof I am now seized or possessed, in any manner howsoever." The testator afterwards acquired other property, and thus the question arose, whether the subsequently acquired property passed by the devise? The case was first before Vice-Chancellor Shadwell, and afterwards on appeal before Lord Cottenham, both of whom were of opinion that after acquired property did not pass. The judgment of the Lord Chancellor turned in a great degree upon the word "now," he being of opinion that the words "whereof I am now seized" were equivalent to the expression "whereof I am seized on the day of making this will," namely the 29th of April 1843. The Lord Chancellor, however, in his judgment, refers to the fact that, in another clause in the will, testator disposes of leasehold property whereof he was then or should at the time of his death be possessed, thereby affording evidence of his intention that, by the other clauses in his will, after acquired property should not pass. In the subsequent case of *Lady Langdale v. Briggs*, one at least of the Lords Justices seems not to approve of the distinction between the words "all my lands" and "all the lands whereof I am now seized," though another of their Lordships seems to think he can perceive

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M. T. 1858. a distinction, and that the word "*now*" may be considered as
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We need not, however, follow this inquiry further, for that case was decided, whether rightly or not, upon the principle that the intention of the testator was supposed to be apparent on the face of the will, that the disposition should not apply to after acquired property, and therefore within the express exception contained in the Act. I may also refer to a case, not yet I believe reported, *In re Farrer's Estate* (a), in this Court, from the Incumbered Estates Court. The circumstances of that case were rather peculiar and complicated. In the earlier part of the will, there was a specific devise of all the testator's real estates in Limerick and Tipperary, excepting those vested in him as trustee or mortgagee. In a subsequent part of the will, there was a disposition of the money due to testator on a certain mortgage he had, affecting the property of his nephew in the county of Limerick; and, by a subsequent clause, he directed that any subsequent acquired property he might die seised of should be a portion of the primary fund for the payment of his legacies. At the date of his will he was declared the purchaser of the mortgaged lands in the Incumbered Estates Court. The lands were afterwards conveyed to him, and then the will was republished by a codicil; still we thought that, upon the whole, the mortgaged lands which were so purchased did not pass by the specific devise, inasmuch as we thought that we found an expressed intention that same should not pass to the specific but to the residuary legatee; so that, in that case, we did not depart from the construction which the words of the Wills Act have received in other cases. So far as the cases go, there can be no doubt that subsequently acquired property will pass, though the terms of the will should amount to a specific devise, which, even in the case of personal estate, would not, before the passing of the Act, have passed after acquired property.

Langdale v. Briggs is also an authority for that; for in that case the specific devise consisted not only of freehold but also of leasehold property, and was held to include leasehold property, the right to which the testator in fact acquired shortly previous to his

(a) *Anie*, p. 370.

death, as the next-of-kin of a testator, though he had not acquired possession of it, and his right to it was not established in his lifetime, as the same depended on the construction of a very doubtful will.

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The Act applies both to real and personal property, and therefore cases, though relating to personalty, may be authorities bearing upon the construction of the Act. The case of *Goodlad v. Burnett* (a) is a strong one. There the testatrix, at the time of making her will, had £3000 in £3½ per cent. stock, and other property to a considerable amount. She gave "my new £3½ per cent. annuities" upon certain trusts, and gave the remainder of her property to a different person as her residuary legatee. The testatrix, after the date of her will, sold out a portion of her other securities, and invested the produce in the purchase of £3½ per cents., of which, at the time of her death, she had to the amount of £17,010; and a question arose between the specific and residuary legatees, regarding the stock subsequently purchased.

The case was argued at considerable length, and all the previous cases referred to. It was admitted in that case that, if it had occurred before the Wills Act, the words were such as would have rendered it a specific bequest of the stock that the testatrix possessed at the date of her will, and would not pass what she subsequently acquired; and the Vice-Chancellor was very much pressed with the argument that there was nothing on the face of the will or in the circumstances of the case to show any intention on the part of the testatrix that the position of the legatees should be so changed in relation to the amount of their respective legacies. The Vice-Chancellor, however, held that it was not incumbent on the specific legatee to show any intention that the after acquired stock should pass—that it might have been quite true that the testatrix had no intention on the subject at the time of her will—not then contemplating the acquisition of further stock of that description; but that, irrespective of such intention on the part of the testatrix, the Act expressly made the rule apply to after acquired property answering the description of the specific bequest, unless the party opposing

(a) 1 Kay & J. 341.

M. T. 1858. such construction was able to show a contrary intent on the face
Common Pleas. of the will. That certainly is a very strong case—very different
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BAXLEY. in its facts, but perhaps not in principle, from the one now before us.

In Mr. Jarman's book on *Wills*, pp. 270–71, this subject is discussed with considerable nicety. He says:—"The application of "the new principle of construction to specific bequests, however, is "attended with more difficulty, and will, in all probability, give rise "to much controversy and litigation, before its precise limits and "effects are fully established. Suppose that a testator, having a "house in Grosvenor-square, bequeaths it by the description of his "messuage in such square, and afterwards sells the property, and "purchases another house in the same square, of which he is pos- "sested at his decease, the bequest might seem to comprise the new "acquisition, by force of the enactment which makes the will speak "from the death; but this will depend upon which of the two con- "structions, that may be put upon the 24th section, is to be consi- "dered as the correct one, namely, whether we are first to transfer "the date of the will to the day of the death, and then see what "property the words refer to? or whether, on the contrary, we are "first to see what property the words refer to (remembering that "words of general description include in themselves after acquired "property), and then transfer the will to the date of the death? It "is obvious that the first construction makes the words include not "only a different interest in the same subject, but also a different "subject answering the same description; while the latter makes "the words include only a different interest in the same subject. "The latter, it is conceived, is the true rule." He then refers to several cases, upon the result of which he comes to the conclusion that the true construction of this Act of Parliament is, to amend the description of the subject-matter as existing at the testator's death, so as to include any new interest in the same subject-matter. In order to apply this rule, as also that to be deduced from the cases to which I have referred, we must ascertain what is the subject-matter of the devise. The answer given by the will is, the lands of Curramore. The next thing to be considered is, what were the lands of Curramore at the time of the making of this will? They were,

in the present case, an entire townland of several hundred acres. Such they were previous to 1780, being then in the possession and the property of a single owner. After that period, they got into the possession of two separate owners; but still the townland or denomination of Curramore comprised both portions—that of Carter and of Bingham. I do not of course mean to say that the whole would have passed by Mrs. Kelly's will, provided she had died seized only of a part; but the fact of the estate not passing in that case would not have arisen from the want of apt words to describe the entire, but from the fact of the testatrix's interest not extending to the entire subject of the devise, but only to a part. If, instead of being entitled to a several portion of these lands, she had been, at the time of making her will, tenant in common with the owners of Carter's moiety, and therefore entitled to an undivided moiety of the lands, and that by her will she had devised not her moiety only of a particular portion of the lands, by words confined to the moiety, but the lands of Curramore generally, what estate would have passed? Nothing, at the time of the making of the will, but the undivided moiety, inasmuch as that was all she had power over; but, in case she had subsequently become the owner of the other moiety, by purchase or devise, even though that devise had been unknown to her, as shown by decided cases, can it be doubted that the whole would pass? In this case, the subject-matter of the devise is one entire thing, the lands of Curramore. If, after the testatrix had acquired that part purchased by her in the Incumbered Estates Court, she had wished to make her will, and thereby dispose of both portions, may I ask what more appropriate description could she use than the "lands of Curramore?" And though it may be quite true, that when she made her will she did not contemplate purchasing Carter's portion of these lands, and therefore formed no intention, one way or the other, in relation thereto, what right have we to speculate as to what her intentions may have been after her purchase? what right have we to speculate that she may not have known or have been advised after the purchase, as to the legal effect of her previous will?

We have been referred, by the Counsel for the defendant, to the

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M. T. 1858. case of *Webb v. Byng* (*a*). It occurs to us that that case, though the decision in it was against the claim of the specific devisee, is, when carefully considered, rather an authority in favour of the plaintiff.

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BAXLEY. The testatrix in that case devised the Quendon Hall estate, in the county of Essex. It appeared that the testatrix had a mansion and demesne, called "Quendon Hall;" but there was no such name or denomination as the "Quendon Hall estate." It appeared, however, that the testatrix was possessed of some farms adjoining her demesne and residence, which, though having distinct names of their own, the specific devisee claimed under the description of "my Quendon Hall estates;" and evidence was received to show that the testatrix, in her lifetime, and up to a period very shortly previous to the making of her will, was in the habit of calling and treating, in accounts and otherwise, those farms as part of her Quendon Hall estate; and, on this evidence, it was held that these farms passed by this description, though, properly and strictly speaking, their name was not Quendon Hall. It further appeared that, shortly previous to the death of the testatrix, and after the making of her will, she had purchased some other small farms, intermixed with and adjoining Quendon Hall. These the specific devisee also claimed; but his claim was disallowed, expressly on the ground that Quendon Hall was not the name of the farms so purchased, and that there was no evidence of the testatrix, since she acquired them, having called and treated them as such; the fact being that she had not held them sufficiently long to have done so. How can it be collected from this case that the result would not have been different, if the Quendon Hall estate was a known denomination, and that the subsequently purchased lands were portion of that known denomination? It appears to me clear, from the perusal of that case, that, if the facts were such as they are in the case before us, the result would have been different. To conclude, therefore, this rather tedious judgment, we find that, at the date of the will in question, the "lands of Curramore" was the proper name and description of the entire townland, consisting of two divisions. We find that, at the death of the testatrix, she was seized of that which is properly

described as "Curramore;" and though, at the date of the will, she was seised only of one division of these lands, we must give effect to the express enactment of the 24th section of the Wills Act, by holding that the entire passed to the plaintiff, there being nothing whatsoever in the will showing a contrary intention on the part of the testatrix. It will be observed that I have altogether refrained from stating what our decision would have been in case the subsequently acquired lands, though of the same name as that in the possession of the testatrix when making her will, were altogether separate and unconnected; as, for instance, if Mrs. Kelly, at the date of this will, was seised of one townland, Curramore, and afterwards purchased another townland, of the same name, in a different part of the country, in no way connected with the former, and that the will, as in the present case, contained a devise of the "lands of Curramore." I may, however, perhaps take leave to say that, when such a case shall arise, it may be found that the principle on which we decide the present case will be found not to apply to such a case as I have supposed, and will be found to differ altogether from that involved in the cases suggested by Mr. *Jarman*, and that put by the learned Counsel for the defendant, in his argument, of a devise of "my house in Merrion-square," having one at the date of the will, and afterwards acquiring another; and perhaps to differ also from the case of a devise of the townland of Curramore, the testator having one of that name at the date of the will, and afterwards acquiring another and distinct townland of the same name. Without, in the slightest degree, interfering with the decision we have made in the case now before us, it may be held, in the case I have supposed, that a devise of "my house in Merrion-square," or "the townland of Curramore," can apply only to one house and one townland; and therefore, to prevent its being void for uncertainty, must apply only to the house or townland of which the testator was seised at the date of his will; but such a case has no application to the present, in which the words used are the proper description of both subjects of the devise. The cause shown must therefore be allowed with costs, and the verdict for plaintiff stand.

Cause shown allowed, with costs.

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E. T. 1858.
Exch. Chanc.

Chequer Chamber.

HOLMES v. SMITH.

April 24.

(Appeal from the Court of Common Pleas.)

In an action by an administrator, for moneys lent, paid, &c., and for work and labour done by the intestate, in his lifetime, to and for the defendant, the latter pleaded, as to part of the cause of action, the Statute of Limitations. The plaintiff, in answer thereto, relied upon the following passage of a letter written to her attorney by the defendant, within six years next before action brought:—

"If Mrs. H. (the plaintiff) can prove I owed her late husband any money for costs or otherwise, I am willing to have it settled at once. This can easily be done, by producing the receipts for the amounts of money he had of mine in his hands."—*Held*, reversing the judgment of the Court of Common Pleas (CAMPION, J., dissentient), that the above document was evidence of such an absolute promise to pay as would defeat the bar of the Statute of Limitations, inasmuch as a promise to account necessarily implied a promise to settle the account.

Warren (with whom was the *Solicitor-General*), for the plaintiff and appellant, contended that the acknowledgment contained in the letter was unconditional, and cited *Prance v. Simpson* (a); *Lidwell v. Mason* (b); *Heylin v. Hastings* (c); *Bewley v. Porter* (d); *Payne v. Whale* (e); *Leaper v. Tatton* (f).

(a) 1 Kay, Chan. R., 678.

(b) 2 Exch. Rep., N. S., 306.

(c) Com. Rep. 54.

(d) H. & J. 368.

(e) 7 East, 274.

(f) 16 East, 420.

Hamilton Smythe and *J. C. Lowry*, contra, for the defendant and respondent, contended that the acknowledgment was upon an unfulfilled condition. They cited *Bateman v. Pindar* (a); *Foster v. Dawber* (b); *Smith v. Horne* (c); *Hayden v. Williams* (d); *Hart v. Prendergast* (e); *Hodges v. Graham* (f); *Thornton v. Illingworth* (g); *Besford v. Saunders* (h); *Yea v. Fouraker* (i).

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Warren replied.*

LEFROY, C. J.

In this case the Court is of opinion, upon the question reserved, namely, whether this letter is sufficient to take the case out of the Statute of Limitations, that it is sufficient. We do not mean to interfere with, or to affect the principle to be collected from, the numerous decisions which have been cited as bearing upon this question. It may not be possible in this case, as in many others, where a long bead roll of authorities has been brought forward, to say that they all exactly tally with each other. What the Court has to do is, and it is the true way of coming at a right decision, to ascertain what is the principle to be collected from the cases, and then to see whether the particular case in question comes within that principle. Now the principle to be collected from the cases is this, that if the new promise be conditional, the condition must be shown to be performed, according to the terms of it; but we are not to add to the condition what the parties have not added to it, nor are we to withhold from the construction to be put on that

(a) 3 Q. B. 574. (b) 6 Exch. 839.

(c) 18 Q. B. 139.

(d) 7 Bing. 163; S. C., 4 M. & P. 811.

(e) 14 M. & W. 141.

(f) 11 & Nap. 49.

(g) 2 B. & C. 824.

(h) 2 H. Bl. 128.

(i) 2 Bur. 1099.

* The *Solicitor-General* having been absent when the case was called on, the appeal was opened by *Warren*; and when the *Solicitor-General* rose to reply, he was stopped by the *LORD CHIEF JUSTICE*, upon the ground that the rule of practice in this Court requires that the same Counsel who opens the argument shall also reply; and his Lordship called on *Warren*, who replied accordingly.

E. T. 1858. condition anything to be collected from other parts of the instrument, calculated to show the meaning and intention of the party.
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SMITH. Now having regard to those principles, which I apprehend cannot be questioned, let us read this letter, and, taking every part of it, one part casting light upon another, let us see what is the true construction of the condition, having regard also to what appears to have been admitted in all the cases, namely, that it is sufficient if there be an acknowledgment of an account pending, and a promise to pay the balance which shall appear due upon foot of that account, when settled; for the very words of the promise, in one of these cases, was, to pay what should appear due upon the settlement. Those cases do not hold that such is a condition to be performed before action brought; but they have held that the result of the settlement referred to might be in the process of the very action, in which the promise to settle is set up to defeat the bar of the statute. Now let me advert to the terms of the letter in question. It says:—"I was always anxious to settle accounts with Mr. Holmes, he having received £3200, on my account, money advanced on mortgage by Messrs. Needham & Wisdom. On speaking to him on the subject, his invariable reply was, 'I'll take care and pay myself.' Here is a distinct acknowledgment of an unsettled account, which the party was always anxious to have settled, but of which, in the same sentence, it appears there had not been a settlement. The letter proceeds:—"I gave Mr. Holmes a list of creditors "I wished paid. I know of one in particular, a coachmaker in Bath, whose account never was settled by him. If Mrs. Holmes "can prove I owed her late husband any money for costs or otherwise, I am willing to have it settled at once." Now is there any qualification in the terms upon which he was willing to settle for the sum proved to be due, other than the proof? He does not say, "prove to my satisfaction;" and if they differed as to the proof, how was it to be decided? Must it not be understood to refer to whatever might be a fit opportunity of making proof, either an action or arbitration? There is a complete sentence, containing a promise that he would be willing to have it settled at once if she could prove *any* money, not a particular sum of money, due on settlement of the

account. Is it not a promise to account, which of itself implies a promise to pay whatever may be found due? The letter goes on to say:—"This is easily done by producing the receipts for the amount of money he had of mine in his hands, £3200." Now is that a condition to make proof *only* by production of these vouchers; or does it apply to the other matters, costs, &c., which were the subject of the account to be settled? If the words of that letter were, "Show me receipts and I will pay," the case would be different, but there are no such terms: on the contrary, it says, in effect, "Whatever money she can prove due I am willing to settle for." Are we then to pare down that promise by annexing thereto a qualification of the kind suggested, as to a particular mode of proof, and time of making it, which the party has not done for himself? That would indeed be to *make* a contract, in place of *construing* it, when already made. It therefore appears to me and to the other Members of the Court generally, with the exception of my Brother CRAMPTON, who is rather disposed to concur with the judgment of the Court of Common Pleas, that the judgment of the Court below should be reversed. The consequence is, that the verdict had for the plaintiff at the trial will stand, and judgment will be entered for him accordingly.

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Each. Cham.
HOLMES
v.
SMITH.

Judgment for the appellant (plaintiff below).

E. T. 1858.
Exch. Cham.

GROOME and others v. BLAKE.

April 20, 21,
 22, 24.

(*Appeal from the Court of Common Pleas.*)

R. B. died in 1819, seized in fee of C. East and of other lands, and of a life interest in C. West; the reversion of which latter estate belonged to L.—R. B., by his will, devised certain real estates to his widow, for her life, with a power of appointing same in fee to either of the sons of P. B., which she exercised in favour of S., the father of the defendant. Upon the decease of R. B., the father of the plaintiff, G. E. B., disputing the title of the widow, entered upon all the lands, including C. West, adversely, as regards the latter, to the rights of the L. family, and continued in undisturbed possession until 1825. From 1825 until 1841, the lands of C. West were under receivers appointed by the Court of Chancery, at the instance of judgment creditors of R. B., G. E. B. and others. The judgments against R. B. had been revived against the heir and terrenants of R. B., and G. E. B. had been served as such. From 1841 to 1844, G. E. B. had resumed and continued in the actual enjoyment of the rents and profits of C. West; and, upon his death, his son and heir-at-law, P. B., succeeded him in possession, until he was evicted therefrom, as well as in respect of the other devised estates, in 1850, by the present defendant S. B., claiming as the eldest son and heir-at-law of S. B., the appointee. A cross ejection was brought in 1857, by P. B., the eldest son and heir-at-law of G. E. B., and a mortgagee of the latter, who had not been a party to the former action, who claimed to recover C. West, upon the ground that G. E. B. and his son had acquired an estate in fee-simple in these lands, by an uninterrupted possession of twenty years and upwards, by the operation of the 3 & 4 W. 4, c. 27, ss. 2, 3 & 34. At the trial, the Judge told the jury, that the appointment of the receivers at the instance of the creditors of R. B., and their interference with the lands, was such an interruption of the twenty years' possession as would prevent the statute from transferring to G. E. B. and his heirs an estate in fee-simple. The jury found that R. B. had only a life estate in C. West, but that G. E. B. and the plaintiff P. B. had not an uninterrupted possession of the same for twenty years.—*Held*, affirming the judgment of the Common Pleas, that the possession of the receiver was not such an interruption of the possession of G. E. B. and P. B., as to prevent the operation in their favour of the Statute of Limitations, and that an indefeasible title against the L. family, and the rest of the world, had accordingly been acquired.

Brewster and C. Andrews were heard on behalf of the appellant (defendant below).

Fitzgibbon and W. J. Sidney, on behalf of the respondents (plaintiffs below).

Cur. ad. vult.

LEFROY, C. J., delivered the judgment of the Court.

This case comes before the Court upon an appeal from the judgment of the Court of Common Pleas, upon points saved by the learned Judge (Greene, B.) who tried the cause. It was an action of ejectment, brought to recover certain denominations of land, called Clooncon West. It is important to the right understanding of the case to observe, that there are two several denominations, respectively known as Clooncon East, and Clooncon West; the latter of which alone is the subject of the present action: but certain events occurred, which for a time mixed them up together. But the two denominations were distinct, and the title to each of them was equally distinct.

Clooncon East belonged in fee-simple to the common ancestor of both the present litigants. Clooncon West belonged to Lord Ross, who appears to have sold the fee-simple to a person named Lanauze, having previously made a lease for three lives to one of the ancestors of the present parties, which lease vested in Robert Blake, who was the last surviving life in that lease. The fee-simple in Clooncon East devolved likewise upon the same Robert Blake. He therefore stood in the position of owner in fee-simple of Clooncon East, and tenant of Clooncon West, for the term of his natural life, as surviving *cestui que vie* of the lease made by Lord Ross. Being thus seised in fee-simple of Clooncon East, and having the absolute right of disposing of it, he afterwards, by his will, according to the interpretation put upon that instrument, in the course of some of the proceedings hereinafter referred to, would appear to have devised those lands to his widow Jane Blake, for her life, with a power of appointment in fee-simple to either of the sons of his brother Peter, namely, Giles Eyre Blake, or Stephen Blake, which she afterwards exercised in favour of Stephen. Both she and the two sons of Peter were parties defendants in the proceedings in Equity which subsequently took place. The operation of the will, however, was not developed for many years afterwards, in fact not until the bringing of the ejectment in 1849. Until that period, it appeared as if Giles Eyre Blake, the son of Peter, and brother of Stephen Blake, had been entitled to the possession of Clooncon East. The will disposed

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E. T. 1858. of other lands, which equally with this denomination had been
Exch. Chanc. subject to the debts of the common ancestors of Stephen Blake and
GROOME Giles Eyre Blake. It appears that, in 1819, Giles Eyre Blake, who
v.
BLAKE. considered that he was entitled to whatever of both East and West
Clooncon had vested in Robert Blake, got into possession after the
death of Robert. Mr. Lanauze, who had purchased the fee-simple
of Clooncon West from Lord Ross, and who had, during the life of
Robert, been in the receipt of the rent under that lease, after the
death of Robert, called upon Giles Eyre Blake, who had entered
into possession of Clooncon West, not only to pay the arrears of the
rent left due by Robert, but also to give up possession of the lands
themselves. It would appear as though Robert had been in the
actual possession of some portion, whilst the rest was in the hands
of undertenants. He, however, refused to surrender, and Lanauze
seems to have been satisfied to allow matters to remain in that pos-
ition, for there does not appear from that time to have been any
step taken by Lanauze to assert his title, which would appear to
have been derelict. So Giles Eyre Blake remained in possession
from 1819 until 1825, and the fact of his having continued in
possession for that period is unquestioned. In 1825, we find, for
the first time, that any proceedings were taken calculated in any
manner to affect the possession of Giles Eyre Blake. In that year
we find proceedings taken for the purpose of appointing a receiver
over these lands, together with the fee-simple estate of which Robert
had been seised in Clooncon East, and another denomination which
had likewise belonged to Robert, called Crumlin, of which latter
Giles is admitted to have been the devisee.

Now, the material question in this case is, what is to be con-
sidered the effect of the appointment of the receiver, as to disturbing
the possession; and whether the fact of his having been extended,
to assert the rights of creditors other than those at whose suit he
was originally appointed, can make any difference? According to
our view of this subject, the extension of the receiver cannot have
any effect, beyond that of his original appointment, on the title of
Giles Eyre Blake. The property was managed by the Court of
Chancery from that time until 1841. The party at whose suit the

receiver was originally appointed was a creditor of Giles Eyre E. T. 1858.
Blake himself; but the receiver was subsequently extended to the demands of creditors of Robert Blake and other ancestors of Giles. After 1841, Giles Eyre Blake appears to have been restored to the possession of Clooncon West, whilst the order for the appointment of the receiver over the other lands remained in force, and the litigation between the creditors and the Blakes still proceeded in the Court of Chancery; and it was not until 1849 that they got back into possession of the remainder of the property, so as to render it desirable for the members of the family to adjust their mutual claims in relation thereto. Thereupon an action of ejectment was brought by Stephen Blake, the son of Stephen, one of the two brothers, against Peter Blake, the son of Giles Eyre Blake, the other brother, for the recovery of the whole of Cloncon, upon the construction which he insisted ought to be put upon the will of Robert, who was alleged to have intended to devise the entire of Cloncon, though under a different name. The result of that action was that, whether by mistake or whatever other cause, a special verdict was found, finding that the testator had a title to both denominations of Cloncon, East and West, upon which judgment was given for the plaintiff; and the *habere* being executed upon both denominations, the present defendant got into possession of all. Upon a subsequent application, made to the Court of Queen's Bench, they refused to set the matter right, by restoring Giles Eyre Blake's representative to the possession of that portion to which the other party had no title, but left the present plaintiff to proceed by a cross-ejectment, to establish his title as against the party who had, by means of that ejectment, got possession of the portion called Cloncon West, which was then and is now claimed by Giles Eyre Blake's representative. The present action was accordingly brought by Peter Blake, the son of Giles Eyre Blake, who asserts his title to Clooncon West. He alleges that, in 1819, his father got into possession of these lands, and held them for six or seven years; and that the only interruption which was suffered, between that time and the period of the bringing of the ejectment, was that which accrued from the appointment of a receiver of the Court of Chan-

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E. T. 1858. cery; and that though the receiver continued to receive the rents of
Exch. Cham. these lands from his appointment in 1825 to the time of his discharge,
GROOME his father retained the possession. He therefore insists that his
v. father and himself had virtually and substantially a possessory title
BLAKE. of twenty years against the other party, who, for the first time, got
into possession under the ejectment in 1849. It is contended that,
in order to establish a possessory title, under the Statute of Limitations, the party must have remained continuously in possession of
the premises during the prescribed period, and that the appointment
of a receiver is sufficient to break that continuity, which alone can
confer such a title. We must therefore see, first, what was the
nature of the original possession of G. E. Blake; and, secondly, what
was the effect of the appointment of the receiver as affecting that
possession. With respect to the first question, we find that, from
the year 1819, he continued either in the actual possession, or in the
pernancy of the profits of these lands, for a period of five or six
years; and, with reference to his rights at that period, supposing
him to be a disseisor, this appeared to me, early in the case, to be
a most material consideration, although the argument rather turned
upon the legal effect of the appointment of the receiver, than upon
the rights of Giles Eyre Blake, as they existed at the time of that
appointment. Looking at the principles of the Common Law, as
expounded by *Lord Coke*, I find a passage which shows exactly the
nature of the rights of Giles Eyre Blake, not only in relation to his
entry, but likewise to his continuance in possession. In *Co. Lit.*,
266 a, it is said:—"If a man be disseised of an acre of land, the
"disseisee hath *jus proprietatis*; the disseisor hath *jus possessionis*,
"and, if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis*." Referring to Mr. *Hargreave's* note upon this
passage, we find it is said:—"These may be subdivided, with respect
"to the disseisor, into that bare, naked possession, which he acquires
"by the disseisin, and the estate by title, which his heir acquires
"by the descent; and, with respect to the disseisee, into that right
"of possession, which he can restore by entry, and the bare right
"which he can only recover by action." Therefore, according to
Lord Coke, the effect of the disseisin was to confer on the disseisor

the *jus possessionis*, as against the whole of the world, except the disseisee himself; but, in case of his death, and the land coming by descent to his heir, the heir had against the disseisee the right of possession, so as to drive him to his *droitural* action. So also, had the feoffee of the disseisor the right to put the disseisee to his *droitural* action. Thus, also, we find that a disseisor might not only have been, but was, the proper tenant to the *præcipe*, in a recovery; he might also have levied a fine, and it would not have been competent to have avoided that, by pleading *partes finis nil habuerunt*, inasmuch as he had such a *seisin* as enabled him to do that act. Such having been the position of Giles Eyre Blake in 1819, in relation to this property, what then was the effect of the appointment of the receiver? Suppose that it had become necessary to enforce the payment of rent against the occupying tenants, by a proceeding at Law, that proceeding must have been taken in the name of the person over whom the receiver has been appointed, and whose rent he was entitled to collect.

The *Anonymous case (a)* which was decided by Lord Hardwicke, and various other cases, which have been so clearly and appositely referred to by Mr. Sidney, I need not now go through; but they establish this proposition, that the effect of the appointment of a receiver is not to alter the rights of the parties. If this receiver had been appointed in a suit between Lanauze and G. E. Blake, there could have been no question at all, but that the inchoate title of G. E. Blake would have been arrested within the proper time, because regard would be had to the then state of the rights of the parties, and the Court would not permit the right, as between the parties in the cause—the very right in question between them—to be affected; but the *jus possessionis*, which G. E. Blake had, was the ground on which the receiver was appointed; the Court could only collect the rents, upon the principle that he had a right to receive them. He, in fact, accordingly received a portion from time to time, and the balance after the discharge of the receiver. The question asked by the jury here was, whether the appointment of the receiver was such a disturbance of the possession of the party in

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E. T. 1858. question as to deprive him of the right against all the world, which
Exch. Chanc. he would otherwise have acquired after the twenty years' possession?
GROOME We think that it had no such operation, and that he was
v.
BLAKE. entitled; and therefore that, when the jury asked that question, they ought to have been informed that there was no such interruption as to prevent his maintaining his rights against Lanauze, on the one hand, or to prejudice his rights against the rest of the world, on the other hand.

Under these circumstances, we affirm the judgment of the Court below, that a new trial should be granted.

Judgment affirmed.

H. T. 1859.
Exchequer.

HOWLEY v. JEBB.*

(*Exchequer*).

Jan. 15. 18.

CASE FOR WASTE.—The summons and plaint complained that, before, &c., the defendant held and enjoyed a certain farm of land, called Cooga, in the county of Sligo, as tenant thereof to the plaintiff from year to year; and, whilst his said farm was so in his possession, wrongfully and unjustly cut and made into turf large quantities of the bog of said land, and took and carried away and converted the same to his own use, to the plaintiff's damage, &c.

Where bog forms a portion of lands demised, the tenant is at Common Law entitled to turbary thereout, by way of estovers, for consumption upon the demised premises.

First defence.—The defendant admits he cut and made into turf certain quantities of the said bog, because the said bog was part and parcel of the said lands of Cooga, held by this defendant, as in the plaint mentioned; and defendant saith that there were, and still are, erected and standing upon the said lands a dwelling-house and offices, thereunto belonging, in which said dwelling-house the defendant, from the commencement of his said tenancy, resided, and still continues to reside therein. That, during the period in the said plaint stated, and during the continuance of defendant's said tenancy, he the defendant cut and made into turf so much of the said bog, and no more, as was necessary and requisite for the purpose of being burned and consumed as fuel in the said dwelling-house and offices appertaining thereto, on the said premises, as was lawful for him to do, for the cause aforesaid; *quæ sunt eadem*, &c.

Second defence.—That it has been, from time immemorial, a custom for the person or persons tenants for the time being of the said lands of Cooga, to cut so much and such parts of the bog, part and parcel of the same, and convert the same into turf, as should be sufficient and requisite for the purpose of burning and consuming the same for fuel in the dwelling-house or houses for the time being

* Before PICOT, C. B., and GREENE, B.

H. T. 1859. erected and standing in and upon the said lands; and that, during the defendant's said tenancy, there was erected and standing a dwelling-house on the said lands, in which the said defendant resided, and which he still continues to occupy, by residing therein; and that, during the said tenancy, pursuant to the said custom, the defendant, as he lawfully might, did cut the said bog, and converted the same into turf; and, in so doing, defendant saith he cut so much of the said bog, and no more than, was necessary and requisite for the purpose of being burned and made use of as fuel in the said dwelling-house; *quæ sunt eadem*, &c.

Demurrer to the first defence, for that no foundation at Common Law or by contract is shown for the alleged right to cut turf, thereby relied on. To the second defence the plaintiff also demurs, for that the custom therein alleged is bad in point of law, and that the alleged right therein relied on is not shown to be founded on prescription, grant or contract, in which alone it lies, and not in custom; and that there cannot be a custom on a particular farm for the particular tenant thereof against his landlord, nor to take a profit *in alieno solo*.

S. Ferguson, for the plaintiff.

As to the first defence, such a right never before appears to have been claimed at Common Law. This is not a case to be ruled by the law of estovers and botes, as that is a right to take timber and woods growing and increasing on the soil; but here the right claimed is to take part of the soil itself. As to the second defence, this is bad, as a particular custom claimed by a particular tenant: *Nicholson v. Smith* (*a*); *Sharp v. Lowther* (*b*). There cannot be a custom for the occupiers, or inhabitants as such, of a particular tenement to have a profit *a prendre* in the lands of another: *Gateward's case* (*c*); *Grimstead v. Marlowe* (*d*).—[PIGOR, C. B. May there not be a custom in the inhabitants of a manor to cut turf?]—In a manor, the custom is laid in a large number of persons, being customary tenants, and as affecting the wastes of the manor; but

(*a*) 1 Lutw. 126.

(*b*) Cas. temp. Hard. 278.

(*c*) 6 Co. 60 *b*.

(*d*) 4 T. R. 717.

the right here claimed for the inhabitants of a particular tenement, to cut turf in another's land, must be by grant; common of turbary must be by grant: *Grant v. Gunner* (a). There is an *obiter dictum* of Grey, C. J., in *Bean v. Bloom* (b), which may be relied on by the other side, viz., "Occupiers of houses may set up a custom to cut turves; occupiers of lands may by custom claim a right *in alieno solo*;" but he there refers to occupiers of a messuage part of a customary manor.

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Beytagh and *W. Bourke*, in support of the defences.

The turf here was taken off a portion of the premises demised, and the defendant has a right to cut so much of that as is necessary for fuel: *Smythe's Land. and Ten.*, p. 411; *Fur. Land. and Ten.*, pp. 659, 312; *De Salis v. Crossan* (c); *Lord Courtown v. Ward* (d); *White v. Walsh* (e). Timber may be cut for estovers; and it is *prima facie* part of the soil, and passes with it. If a tenant claims this profit *a prendre* in his lord's lands, he cannot prescribe, and therefore must claim by custom: *Rogers v. Brenton* (f); *M'Namarra v. Higgins* (g). In *Com. Dig.*, tit., *Common*, B, it is stated that a man may have common so long as he inhabits such a house. Common of turbary may be appendant or appurtenant to a house: *Heyward v. Cannington* (h); *Woodfall Land. and Ten.*, p. 549.

S. Ferguson, in reply.

The passages cited from *Fur. Land. & Ten.* and *Smythe's Land. and Ten.*, are founded on the analogy of this right to the right of estovers; and that is now abolished by statute: *Fur. Lan. & Ten.*, p. 309. As to common being appurtenant, the right claimed here is not a common, but an exclusive profit.

Cur. ad. vult.

PIGOT, C. B.

The question raised by the demurrer to the first defence is,

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| (a) 1 <i>Tannt.</i> 447. | (b) 2 <i>Sir W. Bl.</i> 926. |
| (c) 1 <i>Ball & B.</i> 188. | (d) 1 <i>Sch. & Lef.</i> 8. |
| (e) 1 <i>Jones</i> , 626 n. | (f) 10 <i>Q. B.</i> 28. |
| (g) 7 <i>Ir. Jur.</i> 39. | (h) <i>Sid.</i> 354. |

- H. T. 1859. whether a tenant for years, of land comprising bog, commits waste in cutting upon the bog turf, for the use of the house in which he resides upon the lands? in other words, whether he is entitled, as a legal incident of his tenancy, to use, by way of estovers, so much of the turf of the bog as is required for fuel, or as fire-bote, for his dwelling-house on the lands demised? If this right does not exist at Law, it is singular that no trace should be found of any instance in which it has ever been questioned. That the privilege has been in fact most extensively enjoyed in this country (and, I believe, the same observation applies to some parts of England), is notorious and unquestionable. The cases are very numerous in our books, in which actions, and still more frequently bills for injunctions, have been brought, to redress or to prevent the cutting of turf for sale, or for consumption off the premises demised; but in no instance, either in the judgments of the Courts, or in the arguments at the Bar (that I have found), has the privilege been denied which is now questioned in this action. In all my own experience at the Bar, I never knew or heard of an action for waste, or a bill for an injunction, against a tenant, for using bog, upon the land demised to him, for fuel for his dwelling-house situate on the lands. On the other hand, there is one direct authority in favour of the right; in some other cases, its existence appears to have been assumed by the Courts in their judgments; and there is evidence afforded by text-books that such has been the understanding of the Profession. The very point arose before Lord Manners, in *De Salis v. Crossan* (a). A motion was there made for an injunction to stay waste. The defendant was a tenant upon the estate of the plaintiff. The waste complained of was, cutting "a great quantity of turf;" but the affidavit did not state "that it had been cut for the purposes of sale." The case of *Mitchell v. Dors* (b) was relied on. In that case, the defendant, having begun to get coal in his own ground, worked into that of the plaintiff. In *De Salis v. Croesan*, the plaintiff's Counsel contended that the defendant's conduct was within the principle of *Mitchell v. Dors*, in cutting more than was necessary for fuel. Lord Manners refused the injunction, saying, "The tenant being originally entitled

(a) 1 Ball & B. 188.

(b) 6 Ves. 147.

"to turf as fire-bote, I do not conceive this affidavit to be sufficient even to warrant a conditional order. There is a material difference between this case and that of opening a new shaft for coal upon another person's land, as in *Mitchell v. Dors*; that is waste; this is not." In *Lord Courtown v. Ward* (a), a conditional order was made, "for an injunction to restrain the defendants, who were tenants of the plaintiff, from cutting turf for sale, being entitled only to a right of estovers by their leases." The defendants showed cause on affidavits, showing that they, and those under whom they had derived as tenants of the plaintiff, had been in the habit of cutting turf for sale, for upwards of eighty years. Lord Redesdale, in making absolute the conditional order, said:—"Where a tenant abuses a right of estovers, by using it for an improper purpose, to an extent which his lease or his tenure does not authorise, it is a proper case for an injunction to be granted by this Court; and no length of abuse will authorise the tenant." It does not appear by the report whether the lease contained express provisions that the tenants should have estovers (a provision which would seem to be nugatory and needless, being nothing more than a declaration of a legal incident of the tenure), or whether, the lease being silent on this subject, the Reporters treat the tenant as entitled to estovers, and to estovers only, under their leases, the lease conferring no express right to cut turf, and consequently not giving the privilege of cutting it for sale. In either view, Lord Redesdale's opinion plainly was, that the privilege of cutting turf is capable of being enjoyed as part of the estovers of the tenant.

In *Wilson v. Bragg*, cited as a MS. case, in 8 *Bac. Ab.*, p. 428, tit., *Waste*, O, a bill was brought to restrain a tenant in dower "from getting peat." The Lord Chancellor dismissed the bill, with costs; "it appearing to be vexatious, the peat she sold not being above the value of ten pence." It seems, I think, inferrible from the note of the case, that the defendant was in the habit of cutting the peat for use, and that this was not treated as waste, to be restrained by the injunction. The note proceeds to state:—"But herein it was said, that digging peat is in many places the ordinary

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H. T. 1859. "bote, and perhaps the only fruit that can arise from the land.
Exchequer. "They do not carry away the soil; for they dig off the turf, then
HOWLEY "take away the peat, and lay the turf down again; and a tenant for
v. "life can no more dig peat to sell than cut down timber to sell; and
JEBB. "the Lord Chancellor said, if he was to give any relief, he must
"direct an issue; but the cause was of too frivolous a nature to main-
"tain the expense." It is manifest, I think, that in that case the
tenant in dower (that is, tenant for life with impeachment of waste)
was treated by the Court as only liable to the extent to which she cut
the peat for sale; that the practice existed of cutting it for use, in
the manner described, and that the Court considered the extent to
which the defendant exceeded her legal privilege was too trifling to
warrant a bill for an injunction. If the Court in that case considered
the tenant in dower (that is, tenant for life) entitled to take peat
from the lands of which she was tenant, for consumption on the
lands, though not for sale, then the opinion of the Court directly
applies to the case before us, which is that of a tenant for years.
It is laid down, in *Co. Lit.*, 41 b, "That the same estovers that
tenant for life may have, tenant for years shall have." There
are other cases reported in the books, in which turbary has been
considered as properly designated by the term "estovers." In
White v. Coleman (a), in an action of trespass, the defendant justi-
fied, as the inhabitant of a town, of which the mayor and burgesses
had *common of estovers of turves* for them, and every inhabitant, to
burn in their houses; and the Court, in discussing the case (the
decision of which is not important, in reference to the present
argument), treat the subject of the alleged right as estovers. So,
in *Heyward v. Cannington* (b), in an action of trespass for digging
turves, the defendant pleaded that he was seised of an ancient house,
and prescribed to have so many turfs every year as two men could
dig in a day, as belonging to his messuage. The plaintiff demurred,
"for that it was not shown that the turfs were to be burned in his
"house; and all estovers are to be used in the house, and, as it is
"laid here, they may be sold, although he claims them as appurte-
"nant to his house." The Court, on the discussion, treated the

turbary as estovers, and decided in favour of the plaintiff, on the ground (as appears from the report in 1 *Sid.*, p. 354, and section 2 *Keble*, p. 311), that it was not alleged that they were to be spent in the house; and therefore it did not appear whether the right claimed was in gross, or appurtenant to the house.

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The decision of Lord Manners, in *De Salis v. Crossan*, was in entire accordance with the principle, and the reasons of the rule of law, as to estovers, which he there applied. That rule is founded on the duties and the requirements of tenants holding lands for limited estates, whether for life or for years. They are bound to keep the premises in due repair; and, accordingly, they are allowed, for house-bote, timber to repair the house—for hedge-bote or hay-bote, timber for repairing the fences. In early times, and in remote districts, it would have been in many cases impossible to perform the obligation of making necessary repairs (the want of which would be waste), otherwise than with timber growing on the lands. To enable them to cultivate their lands, it was, for the same reason, important, and in some cases essential, to supply them, from the timber on the lands, with cart-bote and plough-bote, for the construction and repair of necessary conveyances and implements of husbandry; and, for fuel—a necessary of life—they were provided similarly with that part of house-bote which was denominated fire-bote, from the timber which the lands supplied. But even in England, abounding as it now does with timber, and large as its forests formerly were, there were parts of the country (especially in the moor districts) in which it may have been difficult or impossible to procure sufficient timber for fuel; and before the use of coal became general, and roads were made for conducting it to places distant from the coal-fields, peat, where it existed, may have been the only fuel. The case of *Wilson v. Bragg* shows that this state of things was considered as existing, in some places, so recently as 1742. In Ireland, it is a matter of common notoriety that, from the great abundance of bog, and the absence of coal fit for domestic purposes, peat (or turf, as it is called here) has been the ordinary fuel for the great mass of the population, and, in the memory of many now living, was much used by all classes, in places to which there was

H. T. 1859. difficulty of access for sea-borne coal. In a country and in districts so situated, the very nature of things suggests that the principle of the law of estovers should be applied to the materials which alone exist for satisfying its requirements. If timber do not exist, or if it be so scanty and so precious as to be inadequate for those requirements, it would be unreasonable and absurd to restrict the law of estovers to timber alone, and to reject a cheaper, a readier and a more abundant material for fire-bote—a material too in general use for fuel. It appears to me that this view of the law is fortified by the statute 31 G. 3, c. 40 (*Ir.*), which, for the encouragement of planting, took away the right of estovers of timber. It is not likely that the Legislature would have abolished that right, if it were not conscious that it left unaffected a right to fire-bote of a material much more diffused, and much better suited to the habits of the population, than timber fuel. In aid of all those considerations, is one which ought not to be forgotten, namely, that the tenant pays rent for the bog as well as for the rest of the farm, and that some boggy tracts are absolutely useless for any purpose save that of fuel.

I have thought it right to state these reasons, in support of the decision of Lord Manners in *De Salis v. Crossan*, not from any, the least, doubt of the propriety of that decision, but because, since this question has been raised, I think it desirable to state the grounds on which I should be of opinion that the plaintiff must fail, even if that decision had not been made. That the understanding of the Profession has been in conformity with that view, some evidence is afforded by the text-books. It is so stated in clear and explicit language in a book which, both from the contents of the book itself, and from what I know of the ability, learning, care and accuracy of mind of its learned author, I regard as of considerable authority—*1 Fur. Land. & Ten.*, pp. 312–659. It is also stated, in *Smyth's Land. and Ten.*, p. 411; and in *Coote's Land. and Ten.*, p. 562 (an English text-book), *Lord Courtown v. Ward* is cited as establishing that, “Where tenants abuse their right of cutting estovers, the Court will grant an injunction; as, if they cut turf for sale.” Of course, I cite these books not as furnishing a ground of decision in the

propositions contained in them, but as evidence of the understanding of the Profession, as to turbary being within the rule which is applied to estovers by the Common Law.

We are of opinion that the demurrer to the first defence must be overruled. That disposes of the second defence, irrespectively of the particular grounds on which it has been assailed and defended in the argument. It relies on a custom which, being of course local, cannot exist as a custom, if the same right exists at Common Law.

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GREENE, B.

The plaintiff in this case complains that the defendant held under him a certain farm called Cooga, from year to year, and that the defendant cut and made into turf large quantities of the bog of said lands, and converted same to his own use.

The defendant justifies, on the ground, first, that the bog was part and parcel of the demised premises ; that there was a house and offices on the demised lands, in which the defendant resided from the commencement of his tenancy, and that he cut and made into turf so much, and no more, of the bog as was necessary for fuel for the house and offices : and secondly, that by a custom existing from time immemorial, the tenants of that farm of Cooga have been used to cut so much of the bog as might be necessary for fuel to be consumed in the house and offices. As to this latter defence, regarding it as founded upon a custom derogatory from the Common Law, I am of opinion that it cannot be sustained in point of law.

The important question in the case is, whether, by the Common Law, a tenant for life or years is entitled to cut and burn for fuel for a dwelling-house existing on the lands, and parcel of the demise, so much of any bog, forming also a part of the thing demised, as may be necessary to be consumed as fuel for the use of the dwelling-house ? and this depends upon the question, whether a tenant is, under such circumstances, entitled to cut turf, as estovers ? It is perfectly settled that, at Common Law, a tenant is entitled to reasonable estovers of *wood*, for the purpose of fuel necessary to be used in a dwelling-house existing at the time of the demise. If the right to estovers be necessarily limited to *wood*, and do not extend

H. T. 1859. to peat or turf, being part of the soil demised, there . . . no such right in Ireland, it having been abolished by the statute 31 G. 3, c. 40.

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In England this right is generally claimed and exercised with regard to *wood*; and when house-bote, fire-bote, hedge-bote, &c., are referred to in the books, such botes generally mean the right of cutting and using *wood*. But where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise except that of fuel, the question arises, whether a tenant is at the Common Law entitled to use such bog for the purposes of fuel, as he would have been authorised to use timber or wood, had there been any, for a like purpose? I am not aware of any clear or express authority in England upon this point, but we are not without light upon this matter; so as far as judicial decisions, or at least *dicta* in Ireland afford it, Mr. *Furlong*, in his able and very accurate work (vol. 1, p. 312), in enumerating the different rights of common, says:—"There is also another description of right of turbary, which consists in a privilege conferred on "a tenant to cut and save turf for fuel, by way of estovers, in a "bog forming parcel of the demised premises, and which is merely "intended to afford an excuse for committing waste in such bog;" and, in p. 315, he says:—"It is usual in Irish leases to except out "of the demise all bogs and turf mooses, and only to give a privilege "of cutting and saving a sufficient quantity of turf to be used for "fuel on the demised premises:" and, in p. 659, Mr. *Furlong* states that when the chief subject of the demise consists of arable and pasture and bog, as comprised in the general words of the demise, the tenant has only a right to raise so much turf for fuel as will be sufficient for consumption in any dwelling-house on the premises existing at the time of the demise; and he considers this right as governed by the law of estovers.

Let us consider how far this view of the subject is sustained by judicial authority. There are certainly cases in which applications have been made to Courts of Equity in Ireland to restrain the cutting of turf by a tenant for *sale*, and in which injunctions for that purpose have been granted, but in which at the same time, the

right of the tenant to cut turf for fuel has not only been recognised, but, as it would seem, distinctly affirmed. Thus in *Lord Courtown v. Ward* (*a*), where an application was made to Lord Redesdale for an injunction to stay the cutting of turf for *sale*, Lord Redesdale granted it, on the ground that it was an *abuse* of the tenant's right to *estovers*, by using it to an extent which (to use his Lordship's language) his lease or *tenure* did not authorise. This seems a natural recognition of a right, by the *tenure* of the land, to cut for fuel. So in *De Salis v. Crossan* (*b*), Lord Manners refused an injunction to restrain the cutting of turf, because the affidavit to ground the motion did not state that it had been cut for the purposes of *sale*.

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The suits for injunctions indeed have generally been to restrain cutting for sale, as in *White v. Walsh* (*c*), and *Lord Waterpark v. Austen* (*d*). In the former case, according to the report, the order was expressly without prejudice to cut turf for the use of the house. So in *Burrows v. Hayes* (*e*), the application was to restrain cutting for sale.

Again, in *Chatterton v. White* (*f*), the motion was to restrain cutting for sale. The Master of the Rolls there says that he would not hold that a demise of land, with the bog and mountain thereunto adjoining, conferred a right to the lessees to cut for *sale*; and in *Anonymous* (*g*), the Master of the Rolls held that where bog is demised *as such*, or there is nothing but bog demised, the tenant may use the bog as he pleases; from which it is to be inferred that this is the distinction between the demise which confers a right to *sell* and that which involves a right to use for fuel.

House-bote, when referred to in our law books, generally refers, as I have stated, to a right to cut timber growing on the demised premises; but it cannot, I think, be laid down, that such a right is to be confined to lopping or cutting wood, and cannot be exercised by cutting and removing the soil itself of the demised premises. No

(*a*) 1 Sch. & Lef. 8.

(*b*) 1 Ball & B. 188.

(*c*) 1 Jon. 626, n.

(*d*) Ibid. 627, n.

(*e*) Long. & T. 94, n.

(*f*) 1 Ir. Eq. Rep. 200.

(*g*) 1 Hog. 147.

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JEBB. in *Co. Litt.*, 53 b :—“The tenant may dig for gravel or clay for “the reparation of the house, as well as he may take convenient “timber trees.” And in the case of *Wilson v. Bragg*, reported in *Bac. Abr.*, tit. *Waste*, O, where a bill was filed to restrain tenant in dower from getting *peat*, and where the bill was dismissed on account of the small value of the injury, it was said that digging peat is in many places the ordinary *bote*, and perhaps the only fruit that can arise out of the land ; and the distinction is taken between using the turf for *bote*, and selling it.

This is, in effect, an action for waste ; and I do not see how, consistently with the authorities I have mentioned, and those cited by my LORD CHIEF BARON, we can hold that the defendant has committed waste.

NOTE.—“*Bote*” sig. compensation, recompense, satisfaction or amends: *Lamb's Explicit. Sax. Words.* Hence man-*bote*, alias mon-*bote*, i. e., compensation or amend for a man slain which was bound to another : *King Ina's Laws* by *Lambard*, ca. 96. Hence to give to *boot*, i. e., *compensationis gratia*. See *Shene de Verb. Signif.*, tit. *Bote*.

“*Fire-bote*,” an allowance of wood for firing, which a man may, by Common Law, take out of the lands granted to him.

“*Estovers*,” from *Estoffe* from *Estoffer*, &c., to supply with necessaries: *Cowel. Interp.*

NIXON v. HARVEY.

Jan. 19.

In libel, the LIBEL.—The plaintiff in this case had been a Deputy-marshal, in plea that the publication complained of is not a libel is a good plea. the Four-courts Marshalsea, from which employment he had been dismissed previously to the bringing of the present action.

The defendant was the Inspector General of Prisons in Ireland, and the alleged libel was contained in a report made by him to the Lord Lieutenant, in discharge of his duty as such Inspector General.

The summons and plaint contained three counts, and the third H. T. 1859.
 count set out the portion of the report which contained the alleged *Exchequer.*
 libel. Second plea to the third paragraph—"That the matter con-
 tained in the said paragraph is not a libel."

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To this plea the plaintiff demurred.

D. C. Heron, in support of the demurrer.

The plea of no libel is bad at Common Law, and under the Procedure Act. The 71st section of the Procedure Act 1853 says:—
 "In actions for wrongs, defences by way of denial shall take issue
 "on some one or more than one material matter of fact alleged
 "in the summons and plaint; and all defences which admit the
 "matter complained of, but rely on matter of avoidance, excuse or
 "justification, shall be expressly pleaded."

A count for libel differs from every other species of pleading in this, that the whole of the plaintiff's evidence on his *prima facie* case is set out; and the matter, if defamatory, is not libellous in only four cases. It is not a libel if true—if privileged—if it were not published; and lastly, if it be a fair comment in the way of criticism on public men, books or proceedings.

Each of these four defences ought to be separately pleaded; but where on the record the question is, whether the matter complained of be libel or no libel, the only question is, are the statements in the plaint libellous when they are admitted on the record to have been published falsely and maliciously? In this country this plea has been partly discussed in *O'Connor v. Fisher* (*a*) and *Spong v. Fahy* (*b*). Before the passing of Fox's Libel Act, 32 G. 3, c. 60, the question of libel or no libel was admittedly for the Court. The only change that Act of Parliament made in the Common Law was, to permit juries, in criminal cases of libel, to return a general verdict, as they did in all other criminal cases: *Rex v. Nutt* (*c*); *Rex v. Shebbeare* (*d*); *Rex v. Woodfall* (*e*); *Rex v. Shipley* (*f*); *Stockdale's case* (*g*). There, in answer to a question put by the House

(*a*) 4 Ir. Com. Law Rep. 246.

(*b*) 5 Ir. Com. Law Rep. 351.

(*c*) 3 T. Rep. 430, n.

(*d*) Ibid.

(*e*) 5 Burr. 2661.

(*f*) 4 Doug. 73.

(*g*) 22 How. Sta. Tr. 296.

H. T. 1859. of Lords, whether on the trial of an information, or indictment for Exchequer. a libel, is the criminality or innocence of the paper set forth in such NIXON information or indictment as the libel, matter of fact or matter of v. law, where no evidence is given for the defendant? The Judges HARVEY. unanimously answered—"That the criminality or innocence of any "act done (which includes any paper written), is the result of the "judgment which the law pronounces upon that act, and must, "therefore, be in all cases and under all circumstances matter of "law, and not matter of fact; and this as well where evidence "is given as where it is not given for the defendant: the effect "of evidence given for the defendant as to this question being "nothing more than to introduce facts or circumstances into the "case which the prosecutor had left out of it; upon which it will "still be for the law to pronounce whether the act done be criminal "or innocent."

In *Heire v. Wilson* (a), Littledale, J., says:—"If the tendency "of the publication was injurious to the plaintiff, then the law will "presume that the defendant, by publishing it, intended to produce "that injury which it was calculated to effect: if it had that ten- "dency, there can be no doubt it was a libel." *Parmiter v. Coupland* (b); 1 *Taylor on Evidence*, 2nd ed., p. 89.

G. Fitzgibbon and *C. Shaw*, contra, were not called upon.

PIGOT, C. B.

That a defendant, in an action for a libel, is entitled to take the opinion of a jury, upon the question whether the publication complained of is or is not a libel, has been already the subject of decision. *Baylis v. Lawrence* (c); *Parmiter v. Coupland* (d); *Hearne v. Stowell* (e). Upon that point we do not think we ought to say more than that it has been so decided. This, of course, does not at all affect the power or duty of the Court to determine the same question, if it arise on the record.

(a) 9 B. & C. 643.

(b) 6 M. & W. 105.

(c) 11 Ad. & Ell. 920.

(d) 6 M. & W. 105-108.

(e) 12 Ad. & Ell. 719.

"Libel" is a term perfectly well known to the law. It means a defamatory publication, written or printed ; that is, written or printed matter (published), which holds up the party affected by it to hatred, ridicule or contempt ; whether it is or is not of that character is involved in the question whether it is or is not a libel ; and that is a question which must be determined by the jury, if the pleadings be so framed as to submit that question to them. If that be so, the only matter which we have to consider is, how the question may be raised, by the pleadings, for the determination of the jury, consistently with the Common Law Procedure Act of Ireland. Difficulties may, in some cases, exist under the statute, with reference to the manner in which the question should be raised. According to the precedents in the old forms of pleading, the term "libel" was always employed in describing the publication complained of, in a declaration for printed or written slander. According to the form given by the Common Law Procedure Act (schedule C, No. 26), the plaintiff may charge that the defendant "falsely and maliciously printed and published of the plaintiff" the words complained of, without using the term "libel." How a defence should be framed in order to raise the question of "libel or no libel," upon a plaint in that new form, we have not to consider here. Possibly the defence pleaded to the present plaint might be sufficient in that case also. But, in the case before us, the plaintiff alleges, in terms, that the publication complained of is a "libel." It states that the defendant "falsely and maliciously published the libel" complained of. It is contended, on the part of the plaintiff, that in merely denying that the publication is a libel, the falsehood and malice are admitted, and that therefore the plea is bad. But the word "maliciously" comprises two things, viz., malice in law, implied by the law from the very nature of a libel, by reason of the defamation which it imports, and malice in fact, which may be proved by other evidence in addition to the mere defamatory character of the words complained of. If the libel be shown to have been published under circumstances which made it a privileged communication, the implication in law of malice, derived from its defamatory character, is rebutted ; and then the action fails, unless

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H. T. 1859. malice in fact be proved. But if the publication be not defamatory, Exchequer. there is no malice implied by law; and the allegation that words, NIXON v. not defamatory, were maliciously and falsely published, becomes, HARVEY. with a view to an action, nugatory and immaterial. If the publication be not a libel, the very foundation of the action fails, because it is not that kind of publication for which the law gives a remedy by action. The allegation that it is a libel is therefore a material traversable allegation; and the traverse of it is a complete answer to the summons and plaint.

That is the view on which I think this defence ought to be sustained. If it be really intended to dispute the right of the defendant so to plead as to submit the question of "libel or no libel" to a jury, that must be done before some higher tribunal. We are of opinion that this demurrer must be overruled.

RICHARDS, B.

I think it very plain that the defendant in an action of libel is entitled to insist that the publication complained of by the plain-

NOTE.—The 32 G. 3, c. 60, s. 1, is as follows:—"Whereas doubts have arisen whether, on the trial of an indictment or information, for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury empanelled to try the same to give their verdict upon the whole matter in issue: be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the Court or Judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

In *Parmiter v. Coupland* (6 M. & W. 105), in an action for several libels, the Judge having, at the trial, told the jury what, in point of law, constituted a libel, he left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff; the jury found a verdict for the defendant. In support of a rule nisi to set aside the verdict, it was, among other matters, contended, "that the learned Judge ought to have directed the jury that, in point of law, the publications complained of were libels on the plaintiff." The Court set aside the verdict, on payment of costs, being of opinion

tiff is not a libel; and if he can induce the jury to concur with him in considering that the publication is not a libel, he will succeed. How he is to raise that question, otherwise than by a plea

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that the jury had come to a wrong conclusion; but held that there was no misdirection.

PARKER, R.—It has been the course for a long time for a Judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion as a question of fact. The Judge, as a matter of advice to them in deciding in that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's Libel Bill was a declaratory Act, and put prosecutions for libel on the same footing as other criminal cases.

ALDERSON, B.—I entirely concur. The first question is, whether the learned Judge ought to have laid it down positively, that if the publications were proved, and the words were used in their ordinary sense, the jury must find that they were libels. I think it would not be correct so to do; but that he ought—having defined what is a libel—to refer to the jury the consideration of the particular publication, whether falling within that definition or not. I think that if he were to take it upon himself to say that it was a libel, he would be wrong in doing so.

In *Baylis v. Lawrence* (11 Ad. & Ell. 920), a similar decision was made. Lord Denman, at p. 924, referring to the statute 32 G. 3, c. 60, said:—“The statute indeed is applicable only to criminal cases, but it was a declaratory Act, and the importance of declaring the law existed only in the case of criminal libels. The Act, therefore, furnishes clear evidence that the Judge is not in civil cases bound to state his opinion whether the publication be libellous or not; and this agrees with the late decision of the Court of Exchequer, in *Parmiter v. Coupland*.”

In *Hearne v. Stowell* (12 Ad. & Ell. 719), it was held, in conformity with *Wright v. Clements* (3 B. & Ald. 503), and *Goldstein v. Foss* (6 B. & C. 154), that notwithstanding a verdict for the plaintiff in an action for a libel, that Court may, upon a view of the publication as set forth on the record, determine that it is not a libel, and arrest the judgment on that ground. But this review of the record, *after verdict*, would seem to apply only in favour of the defendant. Lord Denman, in *Baylis v. Lawrence*, says:—“There is indeed one case in which a pure question of law may arise. If the Judge and jury think the publication libellous, still if, on the record, it appear not to be so, judgment must be arrested.” And in *Parmiter v. Coupland*, when *Wright v. Clements* was cited in support of the general proposition, that “*the Court* must judge whether the words set out constituted a ground of action or not,” Baron Alderson said, “That is for the benefit of the defendant; the Court are to see whether, in any reasonable sense, the words may be innocent.”

H. T. 1859. of this kind, I do not know; but, if there be any other mode of raising it, be it so. If the defendant adopt a defence by way of excuse or justification, that is not this case, and that defence he must plead; and so there are a variety of other defences he must plead: but what he says here is this:—"Taking this publication "to be as stated, the publication of which I do not deny, it is "not a libel, and I submit that question to the jury, and not the "Court alone." If that be a question for the jury, how else, having regard to Fox's Act, than by a plea of this kind, can the defendant raise it? Upon this short ground I concur with my LORD CHIEF BARON.

GREENE, B.

We must construe the 71st section of the Common Law Procedure Act with reference to the existing law applicable to cases of libel. It never was the intention of the Common Law Procedure Act to deprive a defendant of any defence which he had prior to the passing of the Act; and if that be so, we ought not to give it such a construction as will lead to that result. If we were to hold this plea bad, we should in effect deprive defendants of a privilege which they had prior to the passing of the Common Law Procedure Act, and which was conferred upon them by Fox's Act. The demurrer must be overruled.

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LYSAGHT v. DELACOUR.*

Jan. 28, 29.

COVENANT for rent, upon an indenture of demise.—The summons and plaint averred that one William Lysaght, by deed, bearing date the 2nd day of July 1827, demised to the defendant all that and those that part of the lands of Lodge, situate, &c., with a covenant for perpetual renewal, at the yearly rent of £1. 6s. sterling, by the acre, for each and every acre, English statute measure, said premises contained, and proportionably for roods and perches; said rent to be paid and payable by two even and equal half-yearly payments, on every 25th day of March and 29th day of September in every year, over and above all taxes, charges and impositions “whatsoever, quit-rent, Crown-rent, tithe and composition for tithe only excepted;” and the said defendant, James Delacour, thereby covenanted with the said William Lysaght, his heirs and assigns, that he the said defendant, James Delacour, should and would, from time to time, and at all times thereafter, during the term thereby granted, and every renewal thereof, well and truly pay, or cause to be paid, unto the said William Lysaght, his heirs and assigns, the reserved yearly rent or sum of £1. 6s. sterling, by the acre, for each and every acre, English statute measure, said premises contained, and proportionably for roods and perches, on the days and times and in the manner thereinbefore mentioned and appointed for the payment thereof, clear over and above all taxes as aforesaid: and the plaintiff saith that all the estate and interest of the said William

L. demised to D. certain lands, described as “containing fifty-five acres, or thereabouts; and D. covenanted to pay, during the term, the yearly rent of £1. 6s. by the acre, for each and every acre said premises contained, and proportionably for roods and perches. The quantity contained in the lease was not ascertained by measurement, and for thirty years rent was paid as for a quantity of fifty-five acres. To an action of covenant for the arrears, the defendant pleaded that the lands were stated in the lease to contain fifty-five acres, and that, until the 29th of September 1857, there had been no

more precise ascertainment of the quantity; and it being uncertain what was the quantity, the plaintiff agreed to take the rent, on the basis of the lands containing fifty-five acres, in consideration of the defendant agreeing to pay it at that rate, and that same was accordingly paid and accepted by plaintiff, in satisfaction and discharge of each half-yearly gale.—*Held*, that the plaintiff’s receipts and letters vouching the payment of the rent in full, and demanding it upon that basis, were evidence to sustain the agreement pleaded.

Sensible (*per* PICOT, C. B.)—The plea disclosed a sufficient consideration for the agreement.

It is not open to the plaintiff, upon a new trial motion, to impeach the validity of his adversary’s pleading; he should move for judgment *non obstante veredicto*.

* Before PICOT, C. B., and GREENE, B.

H. T. 1859. "Lysaght, of and in the said demised premises, and of and in the
Exchequer. "reversion thereof expectant upon the said lease, afterwards became
LYSAGHT "and were, and now are, legally and duly vested by mesne assign-
v. "ment in the plaintiff. And the plaintiff further avers that said
DELACOUR. "premises contain, in the whole, 57a. 1r. 10p., English statute mea-
"sure, and that some of the lives in said lease are still in being:
"and, for breach of the said covenant, the plaintiff avers that,
"during the said term, and since the plaintiff became assignee
"thereof, the sum of £107. 0s. 1d., for arrears of the said rent,
"up to and for the 25th of March last, became due, and were
"and now are due and unpaid by the defendant to the plaintiff."

The indorsement of particulars of the plaintiff's demand was as follows :—

"Arrears of the rent of £74. 10s. 2d. a-year, payable to plaintiff under the lease of the 2nd of July 1827, from the 29th day of September 1834 to the 29th day of September 1857, after crediting thereout the sum of £71. 10s. 0d. a-year, paid by the defendant to the plaintiff up to the 25th of March 1857, and the sum of £35. 3s. 10d., paid on account of the rent due on the 29th of September 1857 £69 15 0
"1858, 25th of March—Half a year's rent, due this day ... 37 5 1

£107 0 1"

First defence.—As to the sum of £69. 15s., the first item in the particulars, "That the said lands in the said deed in the summons and "plaint mentioned are by the same deed expressly stated to contain "fifty-five acres, English statute measure, or thereabouts. And the "defendant says that, from the time of the making of the said "demise, up to and including the period of the settlement of the "gale of rent due the 29th of September 1857, as hereinafter "stated, there had been no more precise ascertainment between "plaintiff and defendant of the quantity of land in the demised "premises; nor did the said plaintiff, or any other person entitled "to the rent, notify to the defendant that the said demised premises "contained any greater quantity than fifty-five acres, English statute "measure; but, on the contrary, the said plaintiff, who had full "means of knowing whether the said lands contained more or less "than fifty-five acres, demanded and required payment of the rent "of the said premises from time to time from the defendant, on the

"basis of their containing fifty-five acres, neither more nor less; and H. T. 1859.
"the defendant says that, it being uncertain what was the actual Exchequer.
"quantity of land contained in the said deed, when and as each
"successive half-yearly gale of the rent under the said deed during
"all the period aforesaid accrued due, the plaintiff, during all the
"time aforesaid, agreed to take the said rent at the acreable rent
"mentioned in the said deed, calculated on the basis of the said
"demised premises containing fifty-five acres, in consideration of
"defendant agreeing to pay the same at that rate, which he accord-
"ingly did. And defendant says that he duly paid to the plaintiff,
"and the plaintiff duly accepted and received from the defendant,
"each and every half-yearly gale of the said rent, calculated on the
"said quantity of fifty-five acres, in clear settlement for, and in full
"payment, satisfaction and discharge of each of the several half-
"yearly gales of the said rent under the said deed, up to and
"including the gale of rent due March 1857, and gave to the
"defendant, for said half-yearly gales of the said rent, a clear receipt
"in full for the half-yearly gales of rent payable under the said
"deed, up to and including the gale due March 1857."

As a second defence to the sum of £69. 15s., the first item of the particulars, the defendant set out the facts stated in his first defence, and averred that "The plaintiff, upon every such payment and acceptance and receipt as aforesaid, relinquished and gave to the defendant whatever rest, residue and remainder there was or might have been of each of the said several half-yearly gales of the said rent reserved by and payable under the said deed, over and above the sum of £35. 15s., for or in respect of each gale."

By way of third defence to the sum of £69. 15s.:—"That the said deed in the summons and plaint mentioned demises the said premises therein comprised as containing fifty-five acres, statute measure, or thereabouts: and the defendant says that, during all the time aforesaid, there was no other or further ascertainment of the exact quantity of the said premises; and it being uncertain and unascertained what was the actual quantity of the said premises, as each successive half-yearly gale of the said rent became due, the plaintiff, who had at all times full and ample means of ascertain-

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H. T. 1859. "ing the exact quantity of land in the said premises, in consideration
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 DELACOUR. "that the defendant would agree to pay, and would pay, each half-
 yearly gale, calculated on the basis of the said lands containing
 fifty-five acres, namely, a sum of £35. 15s., he the plaintiff agreed
 to accept the same in full satisfaction, accord and discharge of each
 of the said half-yearly gales of rent reserved by and payable under
 the said deed. And the defendant says that he did, after each half-
 yearly gale of the said rent, up to and including that of the 25th
 of March 1857, became due, pay the said rent to the plaintiff, cal-
 culated as aforesaid, namely, £35. 15s. each half year, and which
 the plaintiff received in clear settlement for, and in full satisfaction
 and discharge of, each and every of the said several and respective
 half-yearly gales."

No question arose upon any other of the defences pleaded. The issues settled upon these pleadings were, whether the first, second and third defences, as to the sum of £69. 15s., were respectively true in substance and fact?

At the trial, before O'Brien, J., at the Summer Assizes of 1858, for the county of Cork, the defendant, upon whom the affirmative of those issues lay, gave in evidence the lease of the 2nd of July 1827, and an indorsement thereon, bearing date in August 1847, inserting a new life; also seven letters from the plaintiff to the defendant, written between the years 1845 and 1858, calculating each half-yearly gale at £35. 15s. The first of these letters was as follows:—

"4th of June 1845.

"I received your letter this evening, and at foot send you the particulars of what is due on foot of the March rent, which I hope you will find correct. The balance is £30. 12s. 4d.

"JAMES LYSAGHT."

Dr.	Cr.
" March 1844 gale £35 15 0	1844, August 20, Cash ... £35 10 0
Sept. 1844 gale 35 15 0	1845, Jan. 17, do. ... 35 15 0
March 1845 gale 35 15 0	Tithe 3 17 11
	Poor-rates, at 10d. in the pound 1 9 9
£107 5 0	£76 12 8 "
Balance, £30 12 4	

Also the letter of the plaintiff, dated 22nd of March 1858, stating that the lands contained 57a. 1r. 10p., and demanding the arrears.

The defendant also gave in evidence twenty-two receipts for rent, for various periods from July 1827; nineteen of those were from the plaintiff to the defendant, and all treated the payment of £35. 16s. for each gale as a payment in full. With this evidence the plaintiff closed his case. The plaintiff's Counsel then called upon his Lordship to direct a verdict for the plaintiff, which he refused to do. The plaintiff was then examined in support of his case; and he stated that he did not, until March in that year, become aware of the exact quantity of land contained in the lease, and that, on discovering the quantity, he wrote to the defendant, demanding the arrears, and that he always took for granted, until March last, that the lands contained fifty-five acres. On cross-examination, he stated that he demanded the rent from time to time, and gave his receipts, on the basis of the lands containing fifty-five acres, and that he never intended then to ask for more; that he never, otherwise than in that way, made any agreement with the defendant to take the rent on the basis of the lands containing fifty-five acres.

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The plaintiff's Counsel then called upon his Lordship for a direction upon all the issues, upon the grounds, first, that there was no evidence to sustain any of the three defences; secondly, that there was no evidence of any agreement to receive the lesser sum in satisfaction of the greater; and thirdly, that there was no evidence of any consideration for such alleged agreement. His Lordship declined to do so, but told the jury that, if they were of opinion that the statements in the defences were true, they should find for the defendant; and he reserved liberty for the plaintiff, in the event of the verdict being against him, to move to set aside the verdict, and enter a verdict for him, in case the Court should be of opinion that he should have directed a verdict for the plaintiff, on any of the grounds relied on. The jury found a verdict for the defendant.

H. E. Chatterton, in Michaelmas Term, obtained a rule *nisi* to set aside the verdict, and enter a verdict for the plaintiff, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against evidence, and the weight of evidence.

The landlord's side of the lease, which was produced during the

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R. Lane (with him *E. Sullivan* and *W. Johnston*) now showed cause.

The only question is, whether there was any evidence to go to the jury, to support the defences pleaded? No other question can be argued upon this motion, as issues upon the truth of the defences were sent to the jury; and the conditional order has been taken upon the ground that the verdict was against evidence. We submit there was abundant evidence to support the findings of the jury; first, the dealings of the parties for thirty years; secondly, the receipts for rent, which are all receipts in full; and thirdly, the letters of the plaintiff himself, demanding the rent as if for fifty-five acres. No evidence could be stronger than this to support the defence, which is substantially this, that the exact quantity of land being, as is admitted, unascertained and unknown, both parties agreed, the one to pay and the other to accept, rent as for a quantity of fifty-five acres. The validity of the defence itself cannot be considered by the Court upon this motion. If that question had been intended to be raised, the plaintiff should have demurred, or should now move for judgment *non obstante veredicto*. The pleas in this case, however, do not state a payment of a lesser sum in satisfaction of a greater, but a payment of the entire sum that the plaintiff was entitled to receive. *The Corporation of Drogheda v. Fairtlough* (a) will be relied on for the plaintiff; but there the receipts given clearly did not support the agreement pleaded, there being upon them an express reservation of the right of the Corporation; and though the question of the consideration for the agreement would appear to have been considered in the judgment, it was not at all necessary for the decision to consider that question. In this case, the landlord had the means of knowing the exact quantity in the lease; and therefore the payment made for fifty-five acres to him, who might have informed himself how much the lands actually

(a) 8 Ir. Com. Law Rep. 98.

contained, amounts to a payment of the whole rent, according to H. T. 1859.
Bramston v. Robins (a); *Waller v. Andrews* (b).

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H. E. Chatterton and W. A. Exham, contra.

The question is, do these pleas show an agreement, i. e., a legal agreement, an agreement for good consideration, to accept the rent as for fifty-five acres, and is there any evidence of such an agreement in fact? It is quite open to the Court now to consider the validity of the pleas; for the objection to the consideration was taken at the trial. *The Corporation of Drogheda v. Fairtlough* is precisely in point upon this part of the case. There is no more consideration for the agreement alleged here than there was in that case; for in both the payment was a payment of a lesser sum in satisfaction of a greater, without any collateral benefit to the plaintiff. The mere fact of the quantity being unascertained would not import consideration into the agreement: *Fitch v. Sutton* (c); *Cumber v. Wane* (d); *Sibree v. Tripp* (e); *Llewellyn v. Llewellyn* (f); *Cooper v. Parker* (g). The receipts, even if there were any consideration for the agreement, are not any evidence; and, at all events, as the agreement was distinctly negatived by the plaintiff's testimony, the verdict ought to be set aside, as against the weight of evidence.

E. Sullivan, in reply.

It is not necessary that the parties should have met, and deliberately entered into an agreement to the effect alleged by the pleas. It was open to the jury to presume an agreement, from the whole of the evidence before them. We do not contend that the receipts are an estoppel against the plaintiff; but we say they were evidence for the jury of an agreement. In *The Corporation of Drogheda v. Fairtlough*, the receipts could not be evidence, because of the express reservation contained in them; that was all the case decided.

(a) 4 Bing. 11.

(b) 3 M. & W. 312.

(c) 5 East, 230.

(d) 1 Str. 426.

(e) 15 M. & W. 23.

(f) 3 Dowl. & L. 318.

(g) 15 C. B. 822.

- H. T. 1859. The observations as to the consideration for the agreement are entirely extra-judicial. If there was any evidence to go to the jury, the verdict cannot be set aside as being against the weight of evidence. The Judge who tried the case is not dissatisfied with the verdict; and that being so, it would be against all precedent to send the case to a second trial.

PICOT, C.B.

We are of opinion that we ought not to disturb this verdict. The questions which we have to determine upon this conditional order are, first, whether there was any evidence to sustain the affirmative of any one of the issues framed on the three defences? and next, whether or not, supposing there was some evidence to go to the jury, that testimony was so slight, and so encountered by opposing proof, that we ought to treat the verdict as unsustained by the evidence, and ought, on that ground, to set it aside? It was further argued (although that is not made any part of the ground of objection in the conditional order), that we ought to set aside the verdict, if we are of opinion that there was no valid consideration for the agreement pleaded. I shall deal, in the first instance, with the first of these questions, whether there was any evidence to sustain any one of the defences pleaded in this case? The first defence rests the case mainly upon this allegation—[His Lordship read the defence].—In a few words, that defence amounts to this, that the quantity of land not having been ascertained by either party, and being unknown to both, the plaintiff required the defendant to pay, and the defendant agreed to pay to the plaintiff, rent according to a quantity of fifty-five acres, and the plaintiff, during all that time, agreed to take that rent, in consideration of the defendant agreeing to pay it. Now what is the evidence to support that defence? It is simply that there being an unascertained quantity of land, and consequently an unascertained rent, a sum was, for each gale, asked by one party and paid by the other, as if the quantity of land were fifty-five acres. The testimony to establish this was the plainest and simplest that can be conceived, as applicable to such a question.

It consisted of evidence of conduct and a course of dealing, leading directly to the inference that an agreement subsisted in fact. The proof was, that for a period, according to express evidence, of thirty years, from 1827, when the lease was made, down to 1857, there was a continued and uninterrupted payment of rent according to a quantity of fifty-five acres, the quantity remaining all that time unascertained by measurement. If that were the only evidence, I should have said that there was evidence to go to the jury to consider whether there could be any other reasonable inference, from such a course of dealing, than that there was a mutual admission at both sides, amounting to an agreement between the parties, governing each payment and acceptance of rent, that the quantity was to be estimated at fifty-five acres, *without measurement*. The receipts vouch the payment of the rent at that sum, and state the acceptance of it expressly in discharge of the whole rent due at each gale for which the receipt is given. There are letters, also, of the plaintiff, some of them dated so far back as 1844, not merely demanding the rent at that sum, but calculating the rent for successive gales, and setting off against that rent, so calculated, successive payments, *as for* fifty-five acres of land, in exact conformity with the whole course of antecedent and subsequent dealing. There is another circumstance in this case which is not without its importance in determining what was intended by both parties. The landlord's side (or counterpart) of the lease, on which this action was brought, and which was produced at the trial, contains an indorsement stating that it is a lease of part of the lands of Lodge, containing (not fifty-five acres, or thereabouts, at a rent of so much per acre, but containing) *fifty-five acres, at the yearly rent of £71. 10s.* It is surely not too much to infer that what the landlord had thus indorsed upon his counterpart of the lease was in contemplation of both the parties in each act of payment of the rent; that is, in no less than sixty transactions, during the period of thirty years, there having been sixty gales of rent paid during that long space of time. The inference to be reasonably drawn is plain and clear; namely, that there was a mutual assent by each party with the other, that fifty-five acres should be the quantity according to which

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H. T. 1859. the rent should be levied; that each party should be spared the expense, and avoid the risk, of a measurement which might show the actual quantity to be either greater or less; and in consideration of this, that the one should pay and the other should accept the rent, according to the quantity so assented to at both sides; *consensus facit contractum*. Such a mutual assent would have amounted to an agreement; and of this, it appears to me that there was abundant evidence for the consideration of the jury.

The next question is, whether or not the verdict was against evidence, and ought, on that ground, to be set aside? The reasons I have already given upon the other branch of the case appear to me to determine that question. It is not necessary to say that the preponderance of the evidence is in favour of this verdict; it is enough that there was that upon which the jury might have fairly exercised their judgment. Upon my own view of the case, I am disposed to say that the verdict was a right one. Supposing I am wrong in that, still the learned Judge who tried the case has not expressed any dissatisfaction with the verdict; and the jury, who, according to the law, have the privilege of deciding on matters of fact, having sufficient evidence before them, and having determined upon that evidence, it would be against the usual course adopted by the Courts, in dealing with applications to set aside verdicts as against the weight of evidence, to disturb this verdict on that ground. Before we should be warranted in setting aside the verdict, as against the weight of evidence, we ought to be satisfied that the evidence in favour of an opposite verdict greatly preponderated. The opinion expressed by Lord Chief Justice Tyndal, in *Mellin v. Taylor* (a), has been often quoted. He says that the general rule is that the verdict shall stand; the setting aside is the exception, and the Court ought to exercise, not merely a cautious, but a strict and sure judgment, before they send the case to a second jury. In the present instance, there is no suggestion that the jury made a mistake, or that there was any obscurity in the evidence, or in the way in which the case was left to them by the learned Judge. They were rightly di-

(a) 3 Bing., N. C., 109; and see *Belcher v. Prittie* (10 Bing. 408.)

rected; they formed their conclusion on evidence which was simple and clear; and it is impossible to say that the evidence was not such that reasonable men might not fairly and reasonably draw from it that conclusion.

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Then, thirdly, it was further argued that there was no consideration for the agreement. Notwithstanding all that has been said and argued with respect to *The Corporation of Drogheda v. Fairtlough* (*a*), I think that question does not properly arise for our consideration upon this conditional order. The English cases that have been cited clearly show that such an objection as this, which arises upon the record, is not the proper subject of a direction of the Judge at Nisi Prius, or for the consideration of the Court on a motion for a new trial. In *Sibree v. Tripp* (*b*), the question arose precisely as here, that there was no consideration for the agreement of accord and satisfaction. The conditional order was in the alternative, to enter a verdict for the plaintiff, upon an issue found for the defendant on a plea of accord and satisfaction, or for judgment for the plaintiff, notwithstanding the verdict on that issue. The first of these alternative matters was discussed upon the sufficiency of the evidence to support the verdict, establishing the agreement pleaded as an accord; the second, upon the question whether there was sufficient consideration for the agreement. The one was treated as within that part of the jurisdiction of the Court under which it determines whether the verdict shall stand or be set aside. The other was treated as within that part of its jurisdiction under which it determines on the sufficiency of the case of either party on the whole record (*c*).

The two questions are very different in their results. The motion for judgment *non obstante veredicto*, if the Court determines that there is upon the whole record that which entitles the plaintiff to judgment, has a very different consequence in respect of costs. In the one case, unless the Court should otherwise order, the costs of the first trial will abide the event, and the party succeeding

(*a*) 8 Ir. Com. Law Rep. 98. (*b*) 15 M. & W. 23.

(*c*) See also *Cooper v. Parker* (14 Com. Bench, 118); and see S. C., in Error, (15 Com. Bench, 822).

H. T. 1859. on the subsequent trial and getting judgment will be entitled to those costs. But if the plaintiff succeeds in obtaining judgment *non obstante veredicto*, he not only does not obtain, but he becomes liable Exchequer.
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DELACOUR. to pay, the costs of the issue on which the abortive verdict was found, a result which he might have avoided by demurring to the defence, on the invalidity of which he succeeds. It appears to me that we should usurp the functions which we possess upon one species of proceeding, if we were to apply them to another proceeding essentially different. With respect to the case of *The Corporation of Dromgheda v. Fairtlough*, I cannot quite understand how the Court had to deal with the question of the consideration of the alleged agreement, upon the exception to the Judge's charge. Possibly they may have so construed the pleadings and the issue before them as to treat the issue as involving the question, whether or not there was a valid and binding agreement, and therefore as involving a mixed question of law and fact. But it appears to me that it was wholly unnecessary to determine that question, because there was another ground presented by the evidence, upon which the Court expressly decided; namely, that there was no evidence whatever of that contract upon which the defendant relied. A large portion of the judgment deals with that question only. The judgment of the Lord Chief Justice is perfectly clear and unanswerable, that there was no sufficient evidence to support the contract pleaded; and it is plain that there was not. The circumstances of the leases in that case were peculiar; the circumstances of the payments made were peculiar. There were two leases made by the old Corporation; and, it having been determined by the House of Lords (and admitted on the pleadings), that the second lease was void, the parties deriving under the lessee were remitted to their title under the first. Pending the dispute as to the validity of the second lease, rent was accepted which was equivalent to the rent reserved by the second lease, with a distinct stipulation, introduced into the receipt for the rent, that it was to be without prejudice to the right of the Corporation to question and impeach the title and tenure under which the defendants claimed to hold. The meaning of that plainly was, that if the second lease should be declared void,

the former lease should stand good and binding, and that all rights and liabilities under it should remain unaffected by that dealing. It followed that in the proof of that dealing there was no evidence for the jury to consider, as a matter of controversy or doubt on the evidence, whether or not the contract was proved. On the contrary, the testimony negatived the existence of any such contract, and it was plainly a case in which the Judge was bound to direct the jury (as he did), that the plaintiffs, on the issue, were entitled to a verdict. Possibly the form of the exception may have induced the Court to entertain the argument; otherwise, it appears to me, with every possible respect, that the observations on the subject of the consideration for the contract, however well-founded in themselves, would have been extra-judicial. The Judge at nisi prius is not entitled to direct the jury to find against a party, because his pleading is insufficient in law, if the allegations contained in it are in issue on the trial, and are proved. I referred, in the course of the argument, to the case of *Ward v. Freeman* (*a*), in the Court of Error in this country, as so ruling. A contract may be void for usury or other illegality; but, if the defendant relies on any such matter—for instance, illegality of consideration for a contract which is admitted in fact—he must, under the 70th section of the Common Law Procedure Act, expressly plead the matter of illegality in his defence. If he do not, he must be excluded from that defence on the trial. It follows that, if he traverses the contract, instead of pleading the illegality, he must fail at the trial if the contract be proved. The question for the jury on such a traverse must be, not whether the contract is void, but whether or not there was such a contract. It is said the word “agreement” imports the whole of the contract, the consideration as well as the promising part; that is so; the case of *Wain v. Warlters* (*b*) shows that conclusively. But when the question is, whether or not there was an agreement in fact, it appears to me a perversion of terms to say, that the consideration and agreement stated in the pleadings and traversed by

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(*a*) 2 Ir. Com. Law Rep. 460; and see *Lamb v. Allday* (1 Crompt. and Jerv. 301), *Keenan v. Phillips* (5 Ir. Law Rep. 442).

(*b*) 5 East, 10.

- H. T. 1859. the defence is not that which is pleaded, whether it be right or *Eschequer.* wrong. If it be wrong, that can be taken advantage of by demurrer, LYSAGHT or by motion in arrest of judgment, by the defendant, or for judgment DELACOUR. *non obstante veredicto*, by the plaintiff.

These are the views which appear to me to apply to the present case; and therefore, even if we were of opinion that this contract was upon a consideration which made it a *nudum pactum*, we should be bound, in my judgment, to hold that it was still a *pact*, although it was *nude*. I must, however, say, that it would require a good deal of argument to satisfy me that, where the amount of the rent due was uncertain and unliquidated, by reason of the lands not having been measured, an agreement on the part of the defendant to pay a stipulated sum in discharge of such uncertain and unliquidated rent, without imposing on the plaintiff the expense and trouble of making a survey and measurement (for which he would have to enter on the defendant's land), and a payment made by the defendant to the plaintiff, of such stipulated sum, in pursuance of such agreement, would not constitute a good consideration, moving from the defendant, for an agreement or "accord," on the part of the plaintiff, to accept the sum so paid in "satisfaction" of such uncertain and unliquidated rent. Such (upon such consideration as I have been able to give to them) appears to me, in effect, the import of, at best, the first and third defences. This, however, is a matter which does not arise before us on the conditional order, and on which we abstain from pronouncing any judgment. The proper course for raising such a question would be, not by a motion for a new trial, but by a motion for judgment *non obstante veredicto* before us, or by a writ of error before an appellate tribunal.

GREENE, B.

This case has been argued with much ability on the part of the plaintiff. I should have had great difficulty in deciding it, if it was to be governed by the law applicable to the doctrine of accord and satisfaction. Considering, however, the obligation which now rests upon the Court, of construing all pleadings according to their substantial effect, we must, I think, treat this defence as resting

not on the payment of a smaller sum in discharge of a greater, but rather as a mode of stating satisfaction of the whole of what the plaintiff was entitled to receive. *The Corporation of Drogheda v. Fairtlough* was, I think, strictly a case of a defence of accord and satisfaction, by payment of a smaller sum in discharge of a greater; but here, at the time when the payments were made, and the money received, there was in point of fact no ascertainment of the plaintiff's demand, other than such as may be inferred from the acts of the parties, by the payment of a certain sum by one, and the acceptance of it by the other. This course of dealing appears to me to be in the nature of a mutual admission between the parties at the time, that the lands did contain in point of fact fifty-five acres, and that rent for fifty-five acres was the measure of the plaintiff's demand. I do not see anything in point of law to render illegal an agreement of that sort, if it really existed; and if it were proved that, instead of a measurement, the parties agreed that the lands should be estimated as containing fifty-five acres, what has occurred would furnish a good defence, because it was a payment of that which the plaintiff himself admitted to be the amount of his demand. There was, it is true, no evidence of an express contract in those terms, and the landlord says he did not enter into any, and that he did not at the time intend to demand any more, because all this was done in ignorance of the facts; and consequently that he is now entitled to fall back, and upon showing that the lands contained more than fifty-five acres, recover from Mr. Delacour the difference. Though there is no direct evidence of an agreement, the receipts and dealings and letters were some evidence (and that is all we have to decide) to go to the jury to sustain this defence, which is substantially this, that there having been no measurement, it was agreed and understood, instead of resorting to a specific measurement, that the quantity of land should be assumed to be that mentioned in the lease. Then it is said the word "agreement" implies both the proof of the agreement in fact, and of the consideration. I agree in that; but I think the same evidence which goes to show that the parties did contract would warrant the inference that the consideration alleged was the consideration which in fact existed.

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H. T. 1869. I concur with my LORD CHIEF BARON, that we are not here to consider the validity of those defences in point of law, and I am not about to pronounce any opinion upon that point. I think we are not at liberty to say that there was no evidence to sustain the defence; and with regard to the verdict being against evidence, I concur with my LORD CHIEF BARON that, as the Judge has not expressed any disapprobation of it, it would be wholly unwarrantable in us to set it aside upon that ground. The sole question, therefore, being whether there was any evidence to go to the jury, I am of opinion that there was some evidence, and that this verdict ought not to be disturbed.

T. T. 1868.

*May 6, 7.
June 12.*

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A note or memorandum in writing, made subsequently to, but evidencing a previous parol contract, is sufficient, within the 2nd section of the Statute of Frauds—⁷
W. 3, c. 12 (the 4th section of the English Act).

A past consideration, from which the law will not imply a promise, will support a subsequent express promise, in itself unobjectionable, if such consideration be moved by the previous request of the party promising.—[Review of the cases upon this subject].

The execution by A, at B's request, of a bill of sale of a vessel to C.—*Held*, a sufficient consideration to support a subsequent express promise by B to pay on C's default.

chase-money payable by the said John M'Teague, in respect of such bill of sale; and the plaintiff avers that, relying on the said contract and agreement by the defendant, he did execute such bill of sale, and did perform all things on the part of him, the said plaintiff, in relation to the said contract to be performed; but the plaintiff avers that neither of them, the said James Gribben or John M'Teague, or the defendant, did pay the said sum of £55, or any part thereof, on the day aforesaid or since, and the same still remains wholly unpaid; of all which said defendant had notice.

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Fourth count.—That it had been agreed between the plaintiff and one James Gribben and John M'Teague, that the plaintiff should execute to them a bill of sale of a certain other vessel of the plaintiff, for the price or sum of £230; and the plaintiff avers that, at the time of executing such last-mentioned agreement, the said John M'Teague omitted to pay over, to or for the plaintiff, the sum of £55, being the balance of the purchase-money payable by the said John M'Teague, in respect of such last-mentioned agreement; and the plaintiff avers that he, the said plaintiff, was thereupon unwilling to execute such bill of sale; and the plaintiff says that defendant then expressly requested the plaintiff to execute the said bill, and that, in consequence of such request, the plaintiff did actually execute the same; and the plaintiff avers that the defendant did, afterwards, in consideration of the plaintiff having so executed said bill of sale, at the instance and request of the defendant, guarantee to the plaintiff the payment to him, by the said John M'Teague, of the sum of £55, on the day following the execution of such bill; but the plaintiff says that neither the said John M'Teague or the defendant did pay the said sum of £55, or any part thereof, on the day agreed on or since, but same still remains wholly unpaid; of all which the defendant had notice.

The defendant, by his defences, traversed the making of the contract stated in the summons and plaint; and the issues settled upon the pleadings were, in substance, whether the defendant contracted as alleged?

At the trial, before Ball, J., at the Spring Assizes of 1858, for the

T. T. 1858. county of Antrim, a letter of the defendant, which it appeared
Exchequer. was written subsequently to the transaction stated in the pleadings,
BRADFORD was relied upon by the plaintiff as a guarantee for the
^{v.} payment of the £55. The jury, upon a question submitted to
ROULSTON. them, found that this letter was a guarantee; and his Lordship
 thereupon directed a verdict for the plaintiff on the second and
 fourth counts, reserving liberty to the defendant to move to have
 a verdict entered for him upon the second count. Upon the other
 counts the jury found a verdict for the defendant.

R. Andrews having, on the part of the defendant, obtained a conditional order to have a verdict entered for him on the second and fourth counts, or that judgment upon the fourth count should be arrested—

The *Solicitor-General* and *F. R. Falkiner* now showed cause.
R. Andrews and *M. Harrison*, contra.

A full statement of the material facts of the case, the arguments of Counsel and the cases cited, will be found in the judgment of the **LORD CHIEF BARON.**

Cur. ad. vult.

PIGOT, C.B.

June 12.

By the conditional order in this case, the defendant seeks to have a verdict entered for him as to the second and fourth counts of the plaint, or (as to the fourth count) that judgment be arrested. It appears from the report of the learned Judge, that the reservation made by him, and the objection to the evidence on which it was founded, applied to the second count only. The questions before us, therefore, are, whether the verdict shall be entered for the defendant on the issue as to the second count? and whether judgment shall be arrested as to the fourth? The plaintiff desiring to retain his verdict on both counts, it becomes necessary to determine both questions. The second count is as follows.—[His Lordship read the second count, and proceeded]—It is unnecessary to state the evidence in detail: in result it established the following facts:—

The defendant was a ship-broker, and had been employed by

the plaintiff to sell a vessel called the Argo. The vessel was sold by the defendant to James Gribben and John M'Teague, for £230. The plaintiff and the two purchasers met the defendant at his office. The bill of sale had been then prepared, and the register of the vessel was ready to be delivered. Gribben produced £115, M'Teague produced £60 only, and the balance of £55 not being forthcoming, the plaintiff, at the request of the defendant, and on the defendant's promise to remit to the plaintiff the balance of £55 on the following day, executed the bill of sale, and delivered it and the register to the purchasers. In about half an hour after all this took place, the plaintiff, who had left the defendant's office, returned and said "he would feel obliged to him" (the defendant) "to commit his promise to writing." The defendant then, at once, wrote the following document, and gave it to the plaintiff, asking him "if that would please him?" The plaintiff said it would, and took the document. It was in these terms:—

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"L. Derry, 15th December 1858.

"JAMES BRADFORD, Esq.

"DEAR SIR.—You are paid short, by Captain Montague, £55, on sale of Argo, which I will remit to you to-morrow, by post.—I am, dear sir, your obedient servant—A. ROULSTON."

The possession of the vessel was not delivered to the purchasers until the following day. The balance of £55 was never paid. The jury found, in effect, that the letter was a guarantee to pay in default of M'Teague. On this finding the learned Judge directed a verdict for the plaintiff, on the second count, reserving leave to the defendant "to move, in regard to the second count, that 'the contract entered into at the time the bill of sale was signed, 'not having been then in writing, a verdict be entered on the second count for the defendant."

The question upon the import of the contract was, I presume, left to the jury, by the consent of the parties, inasmuch as the consideration of the defendant's undertaking (which, of course, formed part of the contract) was not expressed in the writing. The 3rd section of the 19 & 20 Vic., c. 97, allows the consideration of a contract to answer for the debt of another to be proved by parol, and upon the finding of the jury, and upon the reservation

T. T. 1858. made of the point saved by the learned Judge, it must be taken
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BRADFORD that the consideration was proved, as laid. The question which
v. we have to determine is, whether the written evidence of the un-
ROULSTON. dertaking, coupled with the parol evidence of the consideration,
proved by legal evidence, within the Statute of Frauds, the contract,
as stated in the second count? At the time the bill of sale was
executed, there was no contract capable of being proved, under
the Statute of Frauds; but when the action was brought, there
existed, and there was proved at the trial, a note or memorandum
in writing, signed by the proper party.

It was, however, argued that the writing having been given after
the act was performed (namely the execution of the bill of sale),
which was the consideration of the executory contract, and after the
making of the executory contract itself, the proof of the writing not
only does not support the statement that such a contract as is set
forth in the second count had legal existence, but disproves it.

It is unnecessary to decide here how this argument should be
dealt with, if this were a contract under the 18th section of the
Irish Statute of Frauds, 7 W. 3, c. 12 (corresponding with the 17th
section of the English, statute, 23 Car. 2, c. 3). This is a contract
under the 2nd section of the Irish, analogous to the 4th section of
the English Statute of Frauds, which does not annul the parol con-
tract, but only enacts that, "No action shall be brought whereby
"to charge the defendant, upon any special promise to answer for
"the debt, default or miscarriage of another person," unless the
"agreement upon which such action shall be brought, or some
"memorandum or note thereof, shall be in writing, and signed by
"the party to be charged therewith, or some other person thereunto
"by him lawfully authorised." It has been repeatedly held, in refer-
ence to contracts within the 4th section of the English statute, that
they were proveable by writings subsequently signed, and recogni-
sing an agreement previously made. In *Longfellow v. Williams* (e),
the written evidence of the contract offered at the trial was a letter
written to a third person by the defendant, after the forbearance
was given, which was the consideration for the alleged promise.

(e) 2 Peake, N. P. C., 225.

Mr. Justice Lawrence, in admitting the evidence, said, "The Statute of Frauds requires some note or memorandum in writing; such note exists in the present case; the agreement is fully proved by it; and therefore the promise, though originally by parol, is not within the statute." In *Shippey v. Derrison* (a), Lord Ellenborough pronounced a similar rule; and, in each of the cases of *Dobell v. Hutchinson* (b), *Owen v. Thomas* (c) and *Hemming v. Perry* (d), the writing was subsequent to the parol contract. That a letter to a third person has been held good evidence of the contract described in it, is stated by *Lord St. Leonards* (*Ven. and Pur.*, p. 113), citing *Welford v. Beazley* (e) and *Smith v. Watson* (f). The 4th section of the statute was recently the subject of full consideration in the case of *Leroux v. Brown* (g). There, a verbal contract, made in France, was proved by parol. By the law of France, such a contract was binding in that country; and, if the 4th section of the Statute of Frauds had made such a contract void, and had thus made the writing one of the "solemnities" or "ceremonies" of the contract, the law of England, by the comity of nations, would have yielded to the law of France, and the contract would, in the opinion of the Court, have been proveable according to the *lex loci*. But the Court held that, by the 4th section of the Statute of Frauds (differing in this respect from the 17th section), the contract was not to be treated as void, if made in England, because it was not evidenced by writing, but was merely rendered incapable of proof before an English tribunal; that the 4th section regulated the procedure, and that consequently the proof of it must be regulated by the *lex fori* and not the *lex loci*—by the law of England, where the action was tried, and not by the law of France, where the contract was made. Lord Chief Justice Jervis, in giving judgment, said:—"This, therefore, may be a very good agreement, though, for want of compliance with the requisites of the statute, not enforceable in an English Court of Justice."

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| (a) 5 Esp. 190. | (b) 3 Ad. & Ell. 355. |
| (c) 5 Myl. & K. 353. | (d) 2 M. & P. 375. |
| (e) 3 Atk. 508. | (f) Bunn. 55. |
| | (g) 12 C. B. 801. |

T. T. 1858. It was further urged in this case, that the executory contract
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ROULSTON. was executed by the party suing; and consequently the alleged stipulated benefit was gained by the defendant, or the stipulated prejudice was incurred by the plaintiff before the writing was signed; but, in several of the cases which I have cited, this very circumstance occurred; and it must occur, in many instances, or the controversy could not arise. The result of the authorities is, that if the contract be vouched by a note or memorandum in writing, signed by the proper party (at all events, if so signed before the action is brought), that will be sufficient proof under the 4th section of the English (the 2nd section of the Irish) Statute of Frauds. I abstain from giving any opinion as to the effect of such evidence, under similar circumstances, of a contract under the 17th section. At the same time, I may observe that, in several cases of sales of goods, under the 17th section, as in *Saunders v. Jackson (a)*, *Jackson v. Lowe (b)*, and particularly in *Schneider v. Norris (c)*, in which the point seems very clearly presented, the documents constituting the written evidence received of such sales were signed subsequently to the contract.

Since the foregoing part of this judgment was prepared, I have met with a recent case in the Court of Chancery in England, *Barkworth v. Young (d)*, in which the very point in controversy upon this part of the conditional order was decided by Vice-Chancellor Kindersley, holding, that where there was a verbal contract made in consideration of marriage, and a statement of the contract was, after the marriage, made in an affidavit signed by the contracting party, the statement in the affidavit was sufficient evidence of the contract, under the 4th section of the Statute of Frauds. It is singular that, in his able and elaborate judgment, in which he reviews the cases in Courts of Equity, he does not advert to any of the cases decided at Law.

The defendant, by the conditional order, also seeks to arrest the judgment on the fourth count. The plaintiff obtained a verdict upon the issues joined on that count; and as to this, no point was saved,

(a) 2 Bos. & P. 288.

(b) 1 Bing. 9.

(c) 2 M. & S. 286.

(d) 26 Law Jour. N. S., Ch. 163; since reported, 4 Drew. 1.

and no objection was made at the trial. The fourth count states an agreement, by which the plaintiff agreed to execute a bill of sale of a vessel to Gribben and M'Teague, for £230. That at the time of executing that agreement, M'Teague omitted to pay the plaintiff £55, being the balance of the purchase-money payable on that agreement; that the plaintiff being unwilling to execute the bill of sale, the defendant expressly requested him to do so, and that, in consequence of that request, the plaintiff executed the bill of sale; and the count then states that "the defendant did afterwards, in consideration of the plaintiff having so executed said bill of sale, at the instance and request of the defendant, guarantee to the plaintiff "the payment to him, by the said John M'Teague, of the sum of "£55, on the day following the execution of such bill of sale." The question is, whether this count is bad?—the contract alleged being upon an executed consideration, and not being a contract which, from such consideration, the law would imply.

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It is clearly established that, where a past consideration, that is, a thing previously done by the plaintiff at the request of the defendant, is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is *nudum pactum*, on the ground that the whole consideration is exhausted by the promise which the law implies. Among those authorities are *Brown v. Crump* (*a*) ; *Granger v. Collins* (*b*) ; *Hopkins v. Logan* (*c*) ; *Roscorla v. Thomas* (*d*). And this principle of law was recognised and approved in *Kaye v. Dutton* (*e*), by Lord Chief Justice Tindal, and also in all the stages of *Elderton v. Emmens* (*f*). This is in exact conformity with the opinion of Rolle, expressed at the end of his report of *Hodge v. Vavisor* (*g*), and it is involved in the decision of *Docket v. Voyel* (*h*). But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the

- (a) 1 Marsh. 567. (b) 6 M. & W. 458.
 (c) 5 M. & W. 241. (d) 3 Q. B. 234.
 (e) 7 Man. & G. 807; S. C., 8 Scott, N. R., 495.
 (f) 4 C. B. 479; S. C., 6 C. B., 160; S. C., 4 H. L. Cas. 624.
 (g) 1 Rol. Rep. 413. (h) Cro. Eli. 885.

T. T. 1858. defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request. The leading authority for this proposition is *Lampligh v. Brathwait* (a). But it has been so laid down in a great number of ancient authorities. In *Hunt v. Bate* (b), called in several of the books *Hunt v. Baker*, the defendant's servant was arrested and imprisoned in the Compter in London, for trespass. The plaintiff and another, in order that the defendant's business "should not go undone," bailed the servant. The defendant afterwards promised the plaintiff to save him harmless from all damages and costs that might be adjudged against him in consequence of becoming the servant's bail. The plaintiff brought an action upon this promise, for the amount of damages he was compelled to pay as the servant's bail: and after verdict for the plaintiff, the judgment was arrested, "because" (the report states) "there is no consideration whereof the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff, before enlargement and mainprize made of his servant; *for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head*.—But," the Reporter adds, "in another like action on the case, brought upon a promise to pay £20, made to the plaintiff by the defendant, in consideration that the plaintiff, *at the special instance of the defendant, had taken to wife* the cousin of the defendant, that "was a good cause, although the marriage was executed and past before the undertaking and promise; because the marriage ensued *the request of the defendant*." Several cases are referred to in the notes (ascribed to Chief Justice Treby), which are appended in *3 Dyer*, p. 272, to the report of the case of *Hunt v. Bate*. In two of these, *Halifax v. Barker* (c), and *Sandhill v. Jenny* (not reported elsewhere), it is stated that a promise, founded upon a previous matter done by the plaintiff at the defendant's request, was held insufficient; but such a promise was held binding in each of four other cases, one of which was decided by all the Judges. These were, *Rigge v. Bullingham* (d); *Baxter v. Read* (not re-

(a) Hob. 105; S. C., 1 Sm. L. C. 118.

(b) 3 Dyer, 272 b.

(c) Cro. Eliz. 741.

(d) Cro. Eliz. 715.

ported elsewhere); *Gale v. Golsbury* (the history of which is given in the note, 3 *Dyer*, 272 b), and *Sidnam v. Worthington* (a). *Sidnam v. Worthington* was, in substance, the same as *Hunt v. Bate*, with only the difference that the plaintiff became bail at the request of the defendant. In *Gale v. Golsbury*, the defendant requested the plaintiff to deliver £600 worth of wine to J. S.; and the defendant, in consideration that the plaintiff, at defendant's request, had delivered the wine to J. S., promised to pay him if J. S. did not. The action was brought for £200 remaining unpaid: "And adjudged by all the Judges of England, that an action lies by Gale against Golsbury." If the law was truly declared in these decisions, they are direct authorities for the plaintiff, in support of the fourth count of this plaint.

The report of the case of *Hunt v. Bate*, in *Dyer*, is referred to and recognised in a variety of subsequent cases, as laying down a principle of law with reference to past considerations, by which those decisions were influenced. It was so referred to in *Sidnam v. Worthington* (b); in *Marsh & Rainsford's case* (c); in *Dogget v. Dowell* (d); in *Bosden v. Thinnes* (e); in *Jones v. Clarke* (f); in *Townsend v. Hunt* (g); in the leading case of *Lamplleigh v. Brathwait* (h); and in *Oliverson v. Wood* (i). The principle was applied in many of the old authorities, collected in 1 *Rolle's Abr.*, p. 11, *Action sur le cas*, Q, and in the corresponding title, 1 *Vin. Abr.*, p. 29, where the abstracts of the cases in *Rolle's Abr.* are translated, and several others are added: *placita*, 2, 3, 4, 5, 6, 7, 8, 18, 19, 38, 40, 43, 49. Also in *Com. Dig.*, *Action on the case upon Assumpsit* (B 12), where the cases are distinguished from those in which the action does not lie, collected at (F 6). Coming down to later times, we find in *Hayes v. Warren* (k) a decision which has

- (a) Cro. Eliz. 42; S. C., God., 33; S. C., 2 Leon. 224.
- (b) Godb. 33, 27 Eliz.
- (c) 2 Leon. 111, 30 Eliz.
- (d) Owen, 144, 43 & 44 Eliz.
- (e) Tel. 40, 1 Jac. 1.
- (f) 2 Bul. 73, 11 Jac. 1.
- (g) Cro. Car. 408, 11 Car. 1.
- (h) 1 Hob. 105; S. C., 1 Sm. L. C., 119, 13 Jac. 1.
- (i) 3 Lev. 366.
- (k) 2 Str. 933; S. C., Ke. 117; S. C., 2 Bar. 140, 5 G. 2.

T. T. 1858. been repeatedly treated as the ruling modern authority for the proposition that assumpsit will not lie upon a promise for a past consideration, *unless it be at the request of the defendant*. In the report of that case in 2 Barnard., p. 141, the Lord Chief Justice (Raymond), in giving judgment, referred to the case in *Cro. Eliz.*, p. 741 (*Halifax v. Barker*, one of the cases cited in the note to 3 Dyer, p. 272). There, the action was assumpsit: "whereas in consideration that the plaintiff, *by the defendant's appointment*, "and for his debt, shortly before paid to R. S. £60, the defendant assumed to pay it upon request." And it is reported in *Cro. Eliz.*, p. 741, that the Court held the consideration was past, and not sufficient. The Lord Chief Justice, according to the report of *Hayes v. Warren* (a), states:—"They," the Court, "did agree likewise, that where there was an express request at the time of the past consideration being performed, that might, in all cases, be sufficient to support a subsequent promise: and, therefore, the Chief Justice said he could not agree the case cited out of 3 Cro., p. 741, to be law." And, unquestionably, that case is directly opposed (if it was not so decided upon the term "appointment," as not indicating request) to the express decisions in the same book, *Cro. Eliz.*, pp. 42, 59, 807. It is clear that the Court, in *Hayes v. Warren*, affirmed the principle of law laid down in *Hunt v. Bate*, and *Lamplleigh v. Brathwait*. And Mr. Justice Wilmot, who, in *Pillans v. Van Microp* (b), quarrels with the decision in *Hayes v. Warren*, as too much restricting contracts, treats it as "now settled, that where the act is done *at the request* of the person promising, it will be a sufficient foundation to graft a promise upon."

This rule of law was the foundation of express decision in *Wilkinson v. Oliveira* (c). It was recognised in Lord Denman's judgment in *Eastwood v. Kenyon* (d); in that of Lord Chief Justice Tindal, in *Kaye v. Dutton* (e), and in that of Mr. Justice Littledale in *Payne v. Wilson* (f). But in *Rosecris v. Thomas* (g), Lord Den-

(a) 2 Barnard. 141.

(b) 3 Burr. 1671.

(c) 1 Bing., N. C., 490; S. C., 1 Scott, 461.

(d) 11 Ad. & Ell. 452.

(e) 7 Man. & G. 815, 816; S. C., 8 Scott, 502.

(f) 7 B. & C. 427.

(g) 3 Q. B. 234.

man intimated an opinion which, in one construction of the language, would seem to lay down, as a general rule of law, that a past or executed consideration will support no promise save one which the law would imply from it; that proposition importing, not merely that where a promise would be implied by law, and would therefore exhaust the consideration, no other express promise will be sustained by the same past consideration, but further, that no promise *at all* will be sustained by such consideration, *unless* a promise would be implied from it by law, and then only such promise as would be so implied.

The proposition, in that extended sense, has never been the subject of express decision. It did not arise in *Brown v. Crump* (*a*), in *Hopkins v. Logan* (*b*), in *Granger v. Collins* (*c*), in *Eastwood v. Kenyon* (*d*), in *Beaumont v. Reeve* (*e*), in *Jackson v. Cobbin* (*f*), in *Lattimore v. Garrard* (*g*), in *Elderton v. Emmens* (*h*), in any of its stages, nor even in *Roscorla v. Thomas*. In each of these cases (except *Beaumont v. Reeve*), the law implied, from the consideration, a promise which exhausted it. In *Elderton v. Emmens*, the Court of Common Pleas held that the express promise went beyond the implied one, and therefore could not be sustained. The Court of Exchequer Chamber and the House of Lords held that the express promise was only equivalent to the implied one, and they therefore sustained it. In *Beaumont v. Reeve*, the declaration stated, in effect, that the defendant had seduced the plaintiff, and thereby rendered her incapable of procuring an honest livelihood; that they had parted, and agreed to live separate, and to have no further immoral intercourse together; and that as a compensation for the injury which the defendant had done to the plaintiff, and in consideration of the premises, he undertook and promised to pay her a yearly sum of £60. There was in that case plainly no consideration for the promise but the moral obligation to repair

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| (<i>a</i>) 1 March. 567. | (<i>b</i>) 5 M. & W. 241. |
| (<i>c</i>) 6 M. & W. 458. | (<i>d</i>) 11 Ad. & Ell. 438. |
| (<i>e</i>) 8 Q. B. 483. | (<i>f</i>) 8 M. & W. 790. |
| (<i>g</i>) 1 Exch. 809. | |
| (<i>h</i>) 4 C. B. 479; 8 Q. B. 6 C. B. 160; 4 H. L. Cas. 624. | |

T. T. 1858. a wrong. No precedent request or solicitation, either express or Eschequer. involved in the fact of seduction, could have created any sufficient consideration; for the immoral intercourse, with or without an express request, could not have formed any legal consideration, either executory, or executed for a valid promise. It was therefore within the direct authority of *Eastwood v. Kenyon* (*a*), in which, on a review of the authorities, it was determined, that a mere moral obligation will not support an assumpit; and this appears to be the ground of the judgments in *Beaumont v. Reeve*, of Mr. Justice Patteson and Mr. Justice Coleridge. Lord Denman, in *Beaumont v. Reeve*, expounds his own meaning of the proposition which he stated in *Roscorla v. Thomas*, thus:—"The result is, that an express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid;" a proposition which, by the generality of its terms, would exclude the case of a promise of a defendant, founded on a previous benefit rendered to the defendant at his request. I am not sure whether Baron Park, in *Elderton v. Emmens* (*b*) or in *Garrard v. Latimore* (*c*), and Mr. Justice Maule, in *Emmens v. Elderton* (*d*), adopted the proposition in that extended sense, or meant to confine it, as it appears to have been confined by Lord Truro, in 4 *Com. B.*, p. 494, and 4 *H. of L. Cas.*, p. 672; by Mr. Justice Maule in 4 *Com. B.*, p. 496; by Mr. Justice Cresswell in 4 *Com. B.*, p. 496; and Mr. Justice Crompton in 4 *H. of L. Cas.*, p. 439; and as Lord Chief Justice Tindal appears to have done in *Kaye v. Dutton* (*e*), to cases where the consideration is one from which the law does imply a promise, which therefore exhausts the consideration. The Reporter certainly understood the language used in 4 *Com. B.*, p. 496, to be so confined, as appears from his note at that page of his report; and it is perfectly plain that the decision, or the judgment in which it was pronounced, in *Eastwood v. Kenyon*, or the note to *Wenall*

(*a*) 11 *Ad. & Eliz.* 438.

(*b*) 6 *C. B.* 174.

(*c*) 1 *Exch. 809.*

(*d*) 4 *H. L. Cas.* 558.

(*e*) 7 *Man. & G.* 815, 816.

v. *Adney* (*a*), to both of which Lord Denman refers in his judgment in *Roscorla v. Thomas*, give no sanction to a denial of the rule of law laid down in *Hunt v. Bate* and *Lamphleigh v. Brathwait*. Lord Denman, in *Eastwood v. Kenyon*, not only refers to that rule, and to both those cases as establishing it, but refers also to *Townsend v. Hunt* (*b*), as recognizing and acting on the distinction, which those cases establish and explain, between a past consideration with, and a past consideration without, a precedent promise; and he precedes those references by the following passage:—"In holding "this declaration bad, because it states no consideration but a past "benefit, not conferred at the request of the defendant, we conceive "that we are justified by the old Common Law of England." In the note to *Wennall v. Adney*, the case of *Lamphleigh v. Brathwait*, and the distinction there explained, is explicitly stated, without any denial of its authority.

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I have thought it necessary to enter into this detailed discussion, because the language of the Judges, in some of the cases I have cited, is so general that it would seem to sustain the objection to the fourth count of the plaint before us. It is very much to be lamented that the language so used (as reported) was not accompanied with such explanation as would have clearly shown whether the learned Judges intended to declare that in their opinion the rule laid down in *Hunt v. Bate*, *Lamphleigh v. Brathwait* and *Wilkinson v. Oliveira*, and in the multitude of other decided cases which I have mentioned, or the exposition of that rule in *Kaye v. Dutton*, was or was not law. In no one of the cases, in which the language to which I have referred was used by them, was any one of those authorities named; in no one was it stated, that the rule which those authorities expounded and applied was to be no longer treated as a rule of law. I own it appears to me that a rule so well and so long established, if inexpedient, ought to be abrogated, if it all, by an act of the Legislature, or, if otherwise reversed, ought to be reversed only by the highest appellate tribunal; especially when the change would have the effect of narrowing the sphere within which

(*a*) 3 Bos. & P. 249.

(*b*) Cro. Car. 408.

T. T. 1858. mankind shall be permitted to bind each other by their deliberate
Eschequer. dealings.

BRADFORD v. Notwithstanding then the expressions of opinion of the learned

ROULSTON. Judges which I have referred to, unnecessary for determining the questions judicially before them (even if they conveyed the more extended meaning on which I have commented), I cannot, in deference to those expressions of opinion, pronounce a judgment reversing a series of decisions made by successive Judges, and establishing a rule of law that has been understood to prevail for, certainly, more than two centuries.

We refuse to arrest the judgment on the fourth count, or enter a verdict on the second; and our order will therefore be, to allow the cause shown against the whole of this conditional order.

PENNEFATHER, B., concurred.

RICHARDS, B.

Wherever, in the case of a past or executed consideration, the law implies a promise, I take it that no promise can be supported other than that which the law so implies; for the promise implied by the law exhausts the whole of the consideration: and so I would explain the case of *Roscorla v. Thomas* (a), and some other like cases to which we have been referred. But where the law will not imply any promise, I am of opinion that in many cases an express promise, though founded on a past or executed consideration, may be supported: as, if A does an act for B, at his request, and more especially if he does it to his, A's, detriment, and B afterwards, in consideration of such past act, promises to remunerate A, or the like, I am of opinion that such a promise would, in a sense, unite itself with B's previous request, and with the compliance by A therewith, and would be perfectly valid and binding in law, though resting on a past or executed consideration.

There is a vast difference in fact and in law between a service gratuitously rendered and the like service performed or act done at the request of another person. A voluntary courtesy will not

(a) 3 Q. B. 234.

support a premise subsequently made; neither will a mere moral obligation, however sacred, where there has not been any previous request to do the act or render the service relied on: *Eastwood v. Kenyon* (a). But in this case the fourth count alleges that the act of the plaintiff, which is relied on as forming the consideration for the defendant's promise, was done at the request of the defendant.

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No doubt, it is on an executed consideration that the plaintiff relies; and if such a consideration be not sufficient in law to sustain the promise as laid in the fourth count, the motion in arrest of judgment, so far as the verdict is rested on that count, ought to prevail. But in my opinion, the consideration, though a past act of the plaintiff's, is, as laid in the fourth count or paragraph, a perfectly good consideration for the defendant's promise. The cases bearing, or that could by any construction be supposed to bear, on this subject, have been already so fully and laboriously collected and observed upon by my Lord CHIEF BARON, in his very able and most elaborate judgment, that I think it unnecessary to refer to those cases again. Indeed, the meet of them, and I will say the most important of them, will be found collected and discussed in a note to *Lamphleigh v. Brathwaite*, in the first volume of Mr. Smith's *Leading Cases*.

With regard to the case of *Emmens v. Elderton*, ultimately reported in 4 *House of Lords Cases*, there was in that case a manifest attempt on the part of the pleader to lay a promise in his declaration more extensive than the express promise contained in the agreement that it appeared in that case had been entered into between the parties; and, no doubt, in such a case, the additional promise, I mean a promise not found within the contract of the parties (and supposing it to have been so expressed in the declaration), being, as I have mentioned, outside the agreement, and having no consideration to rest on save that which was exhausted by the previous special contract of the parties, ought not, if my view of the law be right, to be supported; and accordingly the Court of Common Pleas, before which Court the case first came, taking that view of the pleading, arrested the judgment; and if the construction which the Court of Common

(a) 11 Ad. & Ell. 452.

77. ~~1852.~~ Please you let me say, in the first place, that the Court of Common Pleas understood the agreement as made between the parties, and distinctly the House of Lords, in their judgment, did not understand the agreement as made by the parties. Please, however, let me say, that the question as raised by the plaintiff was not whether the agreement as made was inconsistent with the agreement made by the parties, or as failing because of such inconsistency. In that case, or, indeed, the plaintiff's statement of it, would allow two different interpretations, at least as regards the Duke of Lurline; and their Lordships, after a little discussion, evidently considered it right to give the pleading that construction which would support the verdict, rather than a construction which would reverse the action.

All I need say, therefore, with reference to *Emanus v. Edmonson*, is, that the Court of Common Pleas understood the agreement as stated on the pleading in one sense, and so arrested the judgment; whereas, the House of Lords, understanding the agreement as stated in the declaration in a different sense, ruled differently. But neither in the one Court nor the other does the principle which I last ventured to express appear to me to have been overruled.

Upon the whole, I am of opinion that the fourth count or paragraph in the plaint is good, and that the motion in arrest of judgment ought to be refused.

I think it unnecessary to say anything upon the other question that has been argued before us; and I fully concur in the judgment already expressed by my LORD CHIEF BARON upon the point, and indeed I could add nothing to his observations.

PILOT, C. B.

My Brother GREENE has authorised me to state that, after some fluctuation of opinion, he concurs in the judgment of the Court.

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Queen's Bench

PEYTON v. LAMBERT.*

(Queen's Bench.)

June 7, 8, 12,

14, 15.

M. T. 1858.

Nov. 9.

EJECTMENT ON TITLE, for the recovery of an undivided moiety† of the Loughscur estate in the county of Leitrim. Upon the trial, before CHRISTIAN, J., at the Leitrim Spring Assizes 1858, it appeared that George Reynolds (called George first) was originally seised of all the Loughscur estate, comprising ninety subdenominations of lands, of which sixteen subdenominations were, every other son of such first son, and their issue male successively, with a devise over in case A should die without leaving issue male of his body, lawfully begotten. The testator then limited similar devises of the same lands to B. and M., moietively, and to their respective eldest sons and their issue male; and, to prevent any misunderstanding of the said limitations to A, and his eldest son, for their respective lives, the testator declared his meaning to be, that in case such eldest son of A should die without issue male, then his real estates should go to the second, third, fourth and every other son of A successively, and to the first and every other son of such second, third, fourth and every other son of A; such second son of A and his issue male to be preferred to such third, fourth and other sons and their issue; and the like rules to be observed with respect to the second, third and other sons of B. and M. respectively; and in case either B. or M. should die without leaving issue male, the share of either so dying should go to the survivor, or, if she were dead, to her first and every other son, if she leave issue male, under the same limitations as the testator had already annexed to the shares of B. and M. respectively, with devise over to the daughters of A, in case both B. and M. should die without issue male.

Held, that the limitations to the sons of A's sons being void for remoteness, by the application of the *cy pres* doctrine, A took an estate for life, with remainder to his sons successively, in tail male, with remainder to B. and M. moietively, for life, with remainder in each moiety to their sons successively, in tail male, with cross remainders to B. and M., for life, with cross remainders in tail male.

Held also, that the word "issue," in the gift over, "in case A should die without leaving issue male," was to be read "such issue," as being referential to the objects of the prior devises, and not as signifying an indefinite failure of issue; and consequently that an estate tail could not be implied in A, B. or M.

A testator, in 1795, devised fee-simple lands to B. and M., in equal shares; "and in case B. should happen to die without issue," he devised B.'s moiety to her husband Y, for life, and to descend immediately, upon Y's death, to M. and her issue; and in case M. should happen to die "without issue," then her moiety "to descend, upon her death, to B. and her issue; and if B. had no issue, then to her husband Y, for life; and in case B. and M. should happen to die without issue," the testator devised the lands to H and his heirs, reserving thereout £10 a-year for life, to a servant of the testator.

Held, that B. and M. did not take, moietively, estates in fee-simple, with cross ex-

* Coram CRAMPTON and O'BRIEN, JJ.

† See Note, p. 489.

T. T. 1552. in 1755, conveyed to H. Maguire and H. Counsel, as the two in the
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 PEYTON
 o.
 LANCASTER. said H. Maguire and H. Counsel, and their heirs, to preserve the
 longest remainders; but, nevertheless, to permit George Nugent
 Reynolds (called George second), to receive the rents thereof in
 life, with remainder to his sons successively, in tail male.

George Reynolds (George first) died in 1753, leaving his only son George Nugent Reynolds (called George second), surviving who, by his will, dated the 4th of May 1753, devised as follows:

"I give and devise to my son George Reynolds (George third),
 "for the term of his natural life, without impeachment of waste, all
 "my lands and real estate soever, subject, however, to the charges
 "and incumbrances hereinafter mentioned; and after the decease of
 "my said son George (George third), I devise all my said re-
 "estate to the first son of the body of the said George (George
 "third), lawfully begotten, or to be begotten, for the term of his na-
 "tural life, remainder in tail male to the first and every other son of
 "such first son, lawfully to be begotten, and their issue male respec-
 "tively, in succession, according to seniority, the issue male of the
 "eldest son always to be preferred to the younger son or his issue:
 "and in case my said son George (George third) shall die without
 "leaving issue male of his body, lawfully begotten, I give and devise
 "all my said real estate to my two daughters, Bridget and Mary

ecutory devises over, in tail; but that B. and M. took, moietywise, estates tail, with cross remainders in tail, subject to Y.'s life estate in B.'s moiety, with ultimate remainder in fee to H.

"The case of *Forth v. Chapman* (1 P. Wms. 668), and other cases, decide that, when real and personal estate is given in a will by the same clauses and in the same terms, a construction may be given to the words *dying without issue*, or to similar expressions as regards the real estate, different from that which is given to such expressions as regards the personal estate" (*per O'BRIEN, J.*)

In contemplation of the marriage of the nephew of B. (a married woman), a settlement, not acknowledged or enrolled, pursuant to the 4 & 5 W. 4, c. 92, was executed by B. and her husband, of lands in which B. had an estate tail. This settlement contained a covenant by B. and her husband to join in deeds of further assurance, in the event of the marriage; and by a deed of the same date as the marriage settlement, between B. and her husband, her said nephew, and the trustees of the marriage settlement, after reciting that, by indenture of even date, the lands were settled to the uses therein declared, with a covenant for further assurance, B. joined with her husband and nephew in conveying the lands, discharged of all estates tail, to the trustees, to the uses declared by the marriage settlement. The latter deed was duly acknowledged and enrolled.

Held, that the latter deed incorporated the marriage settlement by reference, and that B.'s estate tail was thereby barred, and the lands assured to the uses declared by the marriage settlement.

Vanderplank v. King (3 Hars 1) approved of.

" Reynolds, for the term of their respective natural lives, to take as
" tenants in common, and not as joint tenants, all my said real
" estates, equally to be divided between them, share and share
" alike; and after the decease of either of my said daughters, my
" will is, that the share of my daughter so dying shall go to the first
" son of my said daughter, for the term of his natural life, and, after
" his decease, to his first and every other son, in tail male, and the
" issue male of such sons respectively, the eldest of such sons and
" his issue always to be preferred to the younger sons and their
" issue; and my will is, that the share of my daughter who shall
" last die shall go to her first son, and the first and every other son
" of such first son, under the same restrictions and limitations as are
" above annexed to the share of my daughter which shall first die;
" and to prevent any misunderstanding of the limitations herein-
" before made of my said real estates to my said son George, and to
" his eldest son, for their respective natural lives, I declare my will
" to be, that in case such eldest son of my said son George (George
" third) shall die without issue male of his body, lawfully to be
" begotten, then, and in that case, all my said real estates shall go
" to the second, third, fourth and every other son of my said son
" George (George third), respectively, and in succession, according
" to priority of birth, and to the first and every other son of such
" second, third, fourth and other sons of the said George (George
" third), respectively, such second son of the said George (George
" third), and his issue male, to be always preferred to such third,
" fourth, or other sons and their issue; and so of the rest, in regular
" order and succession, according to seniority; and the like rules to
" be observed with respect to the second, third and other sons of my
" said daughters respectively, as to their respective shares; and in
" case either of my said daughters shall die without having issue
" male of her body lawfully begotten, then, and in that case, the
" share of the daughter so dying shall go to the surviving sister;
" or if she be dead, to her first and every other son, if she leave
" issue male, in the same manner, and under the same limitations
" and restrictions as I have already annexed to the shares of my
" said daughters respectively: and in case both my daughters shall
" die without issue male as aforesaid, I devise all my said real

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T. T. 1858. "estates to the daughters of my said son George (George third),
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 PEYTON "as tenants in common, and not as joint tenants, under the same
 v.
 LAMBERT. "same to my said daughters Bridget and Mary Reynolds, and their
 "issue; and in case my said son George (George third) shall
 "leave no issue female, I devise all my said real estates to the daugh-
 "ters of my said daughters, the daughters of my said daughter
 "Bridget to take her share as tenants in common, and under the
 "same limitations and restrictions as hereinbefore mentioned; and
 "the daughters of my said daughter Mary to take her share in like
 "manner."

The testator then charged all his real estates with marriage portions for his daughters Bridget and Mary, and added a codicil, of the same date as the will, in the following terms:—

"Upon further consideration, my will is, that the issue female of
 "my son George (George third) shall have my said real estate in
 "preference to the issue male of my daughters; and I hereby declare
 "that, notwithstanding the order in which the limitations are placed
 "in the above will, that the limitation to the issue female of my son
 "George shall operate as if it had stood in the place of the limita-
 "tion to the issue male of my said daughters, and shall operate in
 "preference thereto. In case I shall die without leaving any issue,
 "or that all my children should die without leaving issue, lawfully
 "begotten, my will is, that all my said real estates shall go to my
 "said wife for the term of her natural life, and, after her decease,
 "to her sister M. D., for the term of her natural life; and after
 "her decease, to J. G., and to his issue, lawfully begotten; and in
 "case he shall have no issue, to Hugh Connell, Esq., and to his
 "issue, lawfully begotten; and in case he shall have no issue, to
 "C. P., and his issue, lawfully begotten."

George N. Reynolds (George second) died in 1787, leaving three children, George N. Reynolds (called George third), Bridget and Mary Anne. Bridget married Richard Young, who took the name of Reynolds. George N. Reynolds (George third), by two recoveries suffered by him in the years 1790 and 1791 respectively, acquired the fee-simple in the said sixteen subdenominations of the

Loughscur estate; and by his will, dated the 30th of April 1795, T. T. 1858.
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 devised as follows:—

"I leave, devise and bequeath unto my sisters Bridget and Mary
 "my several real and personal estates in the county of Leitrim,
 "to be divided share and share alike between them, upon their
 "respective husbands taking the name of Reynolds; but always
 "reserving the house and demesne of Letterfyen to my sister
 "Bridget, as the same shall be in her half and proportion of the
 "said estates; and in case my said sister Bridget shall happen to
 "die without issue, I leave and bequeath her half and proportion
 "of said real and personal estates to her husband Richard Young,
 "during his life, and to descend immediately upon his death to my
 "said sister Mary and her issue; and in case my said sister Mary
 "shall happen to die without issue, then her half and proportion of
 "said estates to descend, upon her death, to my said sister Bridget
 "and her issue, and, if she has no issue, then to the said Richard
 "Young, her husband, during his life; and in case my said sisters
 "shall happen to die without issue, I leave, devise and bequeath
 "said estates to Hugh Connell, of Cranary, in the county of Long-
 "ford, and his heirs, always reserving thereout ten pounds per
 "annum for my servant Patrick Brennan, during his life."

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George N. Reynolds (George third) died in 1802, without ever having had issue, and leaving his two sisters surviving. Mary Anne married Colonel John R. Peyton,* her first husband, in 1802, and he died in 1805, leaving his said wife and two children, John Reynolds Peyton, and Jane Peyton, surviving.

In 1817, Mary Anne married Richard Macnamara, her second

* NOTE.—Upon the occasion of this marriage, articles of agreement, very artificially framed, were executed, by which Mary Anne's undivided moiety of the Loughscur estate was settled upon the said John R. Peyton, for life, with remainder to the said Mary Anne, in case she should survive her said husband, and to such of the issue male of that marriage as she should appoint by will; and in default of such issue male, then to her daughters, share and share alike, with remainders over. To this moiety, the plaintiff Richard Reynolds Peyton was subsequently declared entitled, by a decree of the Court of Chancery, in 1856. The moiety devised to Bridget was the subject of the present ejectment.

T. T. 1858. husband, and of this marriage there was no issue. Jane Peyton
Queen's Bench married J. Lambert, and she and her husband were the defendants
PEYTON in the ejectment. John Reynolds Peyton married Alicia Ennis, and,
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LAMBERT. in contemplation of his marriage, by indenture of release, of the 23rd of November 1836, and made between the said John R. Peyton, first part, the said Richard Y. Reynolds and Bridget his wife, second part, Alicia Ennis, third part, John Ennis, one of the plaintiffs in the ejectment, fourth part, John H. Peyton, heir-at-law of H. Peyton, from whom John R. Peyton derived his paternal estate, which was also comprised in this settlement, fifth part, Richard Y. Reynolds, surviving trustee of the marriage settlement of Colonel Peyton and Mary Anne his wife, sixth part, P. Simpson and T. Henry, seventh part, and the said J. Ennis and G. Hind, eighth part; after reciting that G. N. Reynolds (George the second), by his will, devised all his real estates to his only son G. N. Reynolds (George third), for his life, with remainder to his first and every other son lawfully to be begotten, and their issue, in tail male, remainder to testator's two daughters, Bridget and Mary Anne, for their respective natural lives, as tenants in common; and after the decease of either of his said two daughters, then the share of the said daughter to the first son of said daughter, for his natural life, and, after his decease, to her first and every other son, in tail male, in like succession; and in case either of said daughters should die without leaving issue male of her body, then the share of the daughter so dying to go to the surviving sister, or, if dead, to her first and every son, in tail male, with remainders over, as by the said will would more fully appear; and reciting that, after the death of G. N. Reynolds (George third), without issue, whereby Bridget and Mary Anne became entitled to the said lands, under the limitations of the will of their father (George second), and to the several estates thereby to them respectively limited therein, the said Bridget and Richard Y. Reynolds her husband, in her right, and Mary Anne Reynolds, in her own right, entered into seisin and possession of the said lands. And after also reciting that, by the settlement of 1802, on the marriage of Mary Anne Reynolds and Colonel J. R. Peyton, Mary Anne's moiety

of the Loughscur estate was limited to Colonel Peyton, for life, with remainder to his said wife Mary Anne, for life, in case she should survive her said husband, and to her issue male, as therein mentioned, as by the said deed would more fully appear; and reciting that John R. Peyton was the only issue male of that marriage; and that upon the treaty for the intended marriage, it had been agreed that all the said towns, lands and hereditaments, whereof the said Richard Y. Reynolds and Bridget his wife, and the said Richard Macnamara and Mary Anne his wife, were entitled as aforesaid, and whereof the said John R. Peyton was tenant in tail, or otherwise entitled as aforesaid, and all the estate and interest in remainder, expectancy or otherwise, of John R. Peyton therein, should be settled to the uses and upon the trusts thereinafter contained. And reciting that, for the purposes aforesaid, and in order to enable the said John Reynolds Peyton to carry same into effect, and more effectually to convey and assure the said Loughscur estate, to and upon the uses and trusts thereinafter contained, the said Richard Y. Reynolds and Bridget his wife, with his full approbation and consent, had agreed to become parties to those presents, and thereby to convey, and also to ratify all former conveyances for the benefit of the said John R. Peyton, of all or any part of the said Loughscur estate, so that those presents, and all such former conveyances, might be to the uses and upon the trusts thereinafter contained, saving, however, expressly, and always reserving unto the said Bridget Y. Reynolds, her estate for life, without impeachment of waste, and with all other rights then incident to said life estate in and to all that moiety alone, and not in or to any further part than that said moiety of said Loughscur estate, which the said Bridget and Richard Y. Reynolds, in her right, then respectively held, and the rents and profits of said moiety, during the life of the said Bridget; and that the said Richard Y. Reynolds had also, for the purposes aforesaid, agreed, by way of further assurance, to give up and release all his right and benefit of survivorship (if any), and all other the estate and possibility whatsoever, which he might, but for the execution of those presents, have on the decease of the said Bridget his wife, in the said Loughscur estate, or any part thereof.

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And reciting that, in order to carry the said agreement on their part into effect, the said Richard Y. Reynolds and Bridget his wife had respectively executed those presents, and also covenanted, as thereinafter mentioned, for further assurance, for the purposes thereinbefore and thereinafter expressed, it was witnessed that John Reynolds Peyton, and Richard Y. Reynolds and Bridget his wife, and John H. Peyton, at the request and by the direction of John Reynolds Peyton, according to their respective estates and interests, released and confirmed to the said P. Simpson and T. Henry, in their actual possession, by virtue of a bargain and sale to them by the said John R. Peyton, of the preceding day (amongst other lands), the Loughscur estate, the subdenominations of which were therein specifically described; to hold the same unto the said P. Simpson and T. Henry, their heirs and assigns, save as far as same were altered by the agreement on the part of the said Richard Y. Reynolds and Bridget his wife, thereinbefore mentioned, and their several acts and conveyances in relation thereto, to the limitations in favour of the said Bridget and Mary Anne Macnamara, contained in the will of the said G. N. Reynolds (George second), as thereinbefore set forth, upon the trusts thereinafter; and it was thereby declared that the said P. Simpson and T. Henry should stand seised of the Loughscur estate, to permit and suffer the said Bridget and her assigns to receive the rents and profits of that moiety of said estate to which she was then entitled during her life, without impeachment of waste; and as to the other moiety thereof, to which the said Mary Anne Macnamara and Richard her husband, in her right, were then entitled, and to such other part of said Loughscur estate as the said Mary Anne Macnamara and Richard her husband, in her right, in case she should survive the said Bridget Young Reynolds, should become entitled to under the trusts and limitations of the will of the said G. N. Reynolds (George second), and in the settlement executed upon her marriage with her former husband, Colonel Peyton, to permit and suffer the said Mary Anne Macnamara and her assigns to take the rents and profits of either said moiety, or the whole of said lands of said Loughscur estate, as the case might be, for the certain

estate and interest for which the said Mary Anne was or should be entitled thereto respectively, as aforesaid; and, from and after the determination of said estates and interests, the said Bridget and Richard Macnamara respectively in the said respective parts of said Loughscur estate, and in the meanwhile subject thereto, to the use of said John R. Peyton, his heirs and assigns, until the said intended marriage should be solemnised; and, from and immediately after the solemnisation thereof, to the use of John R. Peyton and his assigns, for life, with remainder to trustees, to preserve contingent remainders, with remainder, subject to a jointure for the said Alicia Ennis, to the first and other sons of the marriage successively, in tail male, with ultimate remainder to the use of the said J. R. Peyton, his heirs and assigns. In this settlement, John R. Peyton covenanted for title to the reversion or remainder of the Loughscur estate, and also that he would, immediately upon the execution of those presents, execute a deed, pursuant to the 3 & 4 W. 4, c. 92, which, it was thereby declared, should enure, as to all the lands therein comprised, to and for the uses and trusts in those presents declared concerning the lands therein comprised. And the said Richard Y. Reynolds covenanted, for himself and the said Bridget his wife, that, for the more effectually confirming those presents, and giving full efficacy to the uses and trusts therein contained, and, if necessary in that behalf, for barring all estates tail and remainders under the will of G. N. Reynolds (George second), or otherwise, or to which the said Bridget might become entitled by survivorship or otherwise, the said Richard Y. Reynolds and Bridget his wife, their respective heirs and assigns, would, from time to time thereafter, in case the said marriage should take effect, execute and acknowledge all further assurances, without prejudice to the said life estate of Bridget Y. Reynolds in the moiety then held by her and her said husband; and that such assurances, when so executed and acknowledged by the said Richard Y. Reynolds and Bridget his wife respectively, should enure to the uses and upon the trusts and subject to the several conditions and limitations therein-before declared concerning the said Loughscur estate, and every part and parcel thereof.

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T. T. 1858. This indenture was executed by Richard Y. Reynolds, and Bridget his wife, but not enrolled, nor was it acknowledged by Bridget, pursuant to the Fines and Recoveries Abolition Act (4 & 5 W. 4, c. 92); but by an indenture of the same date (23rd of November 1836), and made between the said John Reynolds Peyton, of the first part, the said Richard Y. Reynolds and Bridget his wife, of the second part, and the said P. Simpson and T. Henry, of the third part: reciting that, by the said indenture of settlement of even date, all the estate and interest of the said John Reynolds Peyton and Richard Y. Reynolds and Bridget his wife, in the Loughscur estate, were conveyed and assured by the said John Reynolds Peyton and Richard Y. Reynolds and Bridget his wife, with his consent, to the uses therein declared concerning the same, reserving to the said Richard Y. Reynolds and Bridget his wife their estate and interest, in right of said Bridget, to the moiety of the Loughscur estate as then held by them; and also reciting the covenants for further assurance in the settlement of even date, and that it had been deemed expedient that the said John R. Peyton and Richard Y. Reynolds and Bridget his wife should respectively execute those presents, in order, as far as they lawfully could, to bar all estates tail of the said John R. Peyton and Bridget Y. Reynolds respectively, in the lands in the settlement of even date, and thereafter mentioned, and all estates and interests to take effect on the determination or in defeasance of such estates tail, and to release and dispose of all remainders and other estates of the said Bridget therein, save her said life estate and interest in the said moiety of the Loughscur estate as aforesaid, to the intent that the absolute fee-simple and inheritance of the said lands, subject to said life estate, might be vested in the said P. Simpson and T. Henry, and their heirs, to and for the several uses, intents and purposes, and with, under and subject to the powers, provisoos, conditions and limitations contained in the said recited marriage settlement: it was witnessed that the said John R. Peyton and Bridget Y. Reynolds, with the concurrence of her said husband, Richard Y. Reynolds, and also the said Richard Y. Reynolds released and confirmed to the said P. Simpson and P. Henry, their heirs and assigns, all the lands and hereditaments therein-

after described, and also described in the said recited marriage settlement, being the Loughscur estate, to hold the same to the said P. Simpson and T. Henry, their heirs and assigns, to the uses, upon and for the trusts, for the estates, and with and under and subject to the several powers, provisoies, conditions and limitations, expressed and contained in and by said recited indenture of settlement. This disentailing deed of 23rd of November 1836 was duly acknowledged by Bridget Y. Reynolds, and enrolled. There was issue of the marriage of John R. Peyton and Alicia Ennis, three sons, of whom the eldest was Richard R. Peyton, one of the plaintiffs in the ejectment.

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Bridget Y. Reynolds died in 1842, without ever having had issue; and Richard Y. Reynolds, her husband, died in 1848; and, in the same year, Richard Macnamara, the second husband of Mary Anne Macnamara, also died. John R. Peyton died in 1850, leaving his son, Richard R. Peyton, surviving. In 1853, Mary Anne Macnamara executed a disentailing deed (duly enrolled) of the Loughscur estate, and limited the estate to such uses as she should appoint by deed or will, and, in default of appointment, to herself, her heirs and assigns; and by her will, dated the 27th of February 1855, she appointed the moiety of the Loughscur estate, comprised in the articles of agreement of 1802, to two of the sons of the defendants, with a general residuary devise of all her other property to the separate use of the defendant Jane Lambert, her heirs and assigns. Mary Anne Macnamara subsequently died, in 1855. A cause petition, to waive temporary bars, was filed in 1858, and an order made thereon, restraining the defendants in this action from setting up any leases or any other temporary bars, or outstanding legal estates, as a defence to this ejectment.

Upon the trial, the learned Judge directed a verdict for the plaintiffs, reserving liberty to the defendants to have the verdict changed into a nonsuit, or a verdict for themselves, if the Court above should be of opinion that they were so entitled. A conditional order, to enter the verdict for the defendants, was obtained on the 19th of April last, pursuant to the leave reserved.

T. T. 1858. *Brewster and W. Bourke* (with them *J. McMahon*), for the plain-
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LAMBERT. *Butt and C. Andrews* (with whom was *H. J. Leslie*), for the defendants.

The following cases were cited:—*Nicholl v. Nicholl* (a); *Pitt v. Jackson* (b); S. C., nom. *Smith v. Camelford* (c); *Stackpoole v. Stackpoole* (d); *Bamfield v. Popham* (e); *Humberston v. Humberston* (f); *Robinson v. Hardcastle* (g); *Vanderplank v. King* (h); *Hopkins v. Hopkins* (i); *Baker v. Tucker* (k); *Cormack v. Copons* (l); *Goodright v. Denham* (m); *Slater v. Dangerfield* (n); *Ex parte Davies* (o); *Jesson v. Wright* (p); *Roddy v. Fitzgerald* (q); *Mortimer v. West* (r); *Woden v. Andrews* (s); *Doe v. Halley* (t); *Parr v. Swindels* (u); *Brooke v. Turner* (v); *Jones v. Ryan* (w); *Moneypenny v. Dering* (x); *Stanley v. Leonard* (y); *Fisher v. Barry* (z); *Somerville v. Lethbridge* (aa); *Seaward v. Willock* (bb); *Hayes v. Hayes* (cc); *Blinston v. Warburton* (dd); *Doe v. Frost* (ee); *In re O'Donoghue's Estate* (ff); *Pells v. Brown* (gg); *Pinbury v.*

(a) 2 W. Bl. 1159.

(b) 2 Br. C. C. 51.

(c) 2 Ves. jun. 698.

(d) 4 Dr. & War. 320; S. C., 6 Ir. Eq. Rep. 18.

(e) 1 P. Wms. 54.

(f) 1 P. Wms. 332.

(g) 2 T. R. 241.

(h) 3 Hare, 1.

(i) Cas. temp. Talb. 44; S. C., 1 Atk. 580.

(k) 11 Ir. Eq. Rep. 104, affirmed 3 H. L. Cas. 108; S. C., 14 Jur. 771.

(l) 17 Beav. 397.

(m) Dougl. 264.

(n) 15 M. & W. 263, 272, 274.

(o) 2 Sim., N. S., 114; S. C., 21 Law Jour., Ch., 135; 15 Jur. 1102.

(p) 2 Bls., O. S., 1.

(q) 4 Ir. Com. Law Rep. 74; affirmed on appeal by Ex. Ch., 7 Ir. Com. Law Rep. 138, and in Dom. Proc., not yet reported.

(r) 2 Sim. 274.

(s) 2 Bing. 126.

(t) 8 T. R. 5.

(u) 4 Russ. 283.

(v) 2 Bing., N. C., 422.

(w) 9 Ir. Eq. Rep. 249.

(x) 16 M. & W. 418, 434.

(y) Anstr. 355.

(z) 2 Hog. 153.

(aa) 6 T. R. 213.

(bb) 5 East, 198.

(cc) 4 Rus. 311.

(dd) 2 K. & J. 400; S. C., 2 Jur., N. S., 858; 25 Law Jour., Ch., 488.

(ee) 3 B. & Ald. 546.

(ff) 3 Ir. Jur., N. S., 114.

(gg) Cro. Jac. 590.

*Ellkin (a); Stratford v. Powell (b); Wilkinson v. South (c); Roe T. T. 1858.
v. Jeffery (d); Parker v. Birks (e); Rackstraw v. Vile (f); Bough- Queen's Bench
ton v. James (g); Field v. Moore (h); Jolly v. Handcock (i); Crofts PEYTON
v. Middleton (k); Dillon v. Grace (l); Tayleur v. Dickenson (m); LAMBERT.*
1 Jarman on Wills, 2nd ed., p. 245; *2 Jarman on Wills*, 2nd ed.,
p. 422; *Prior on Issue*, p. 156, ss. 263, 264, p. 121; *2 Pow. Dev.*,
p. 602; statutes 4 & 5 W. 4, c. 92, ss. 18, 39, 43, 45, 49, 70; and
3 & 4 W. 4, c. 74, s. 74.

CRAMPTON, J.

This case was heard in the last Term, before my Brother O'BRIEN and myself. The case is one of great importance; and we felt that it was likely that the parties would carry it to the Court of Error. Under these circumstances, on the last day of the Term, we gave a formal judgment in the case, in order that the parties might not be delayed in their proceedings; intimating, however, our intention upon a future day to state the grounds of our decision; and this being a convenient time for the purpose, I now proceed to state the reasons upon which we arrived at the conclusion that the plaintiff was entitled to judgment.

This was an ejectment upon the title, brought for recovery of an *undivided moiety* of certain lands, called the Loughscur estate, in the county of Leitrim. The Loughscur estate comprised a great many denominations of land, ninety (it was said) in number, and, of these ninety denominations, sixteen were somewhat differently circumstanced, as to the devolution of title, from the other denominations. The pedigree of the parties, so far as it is

- (a) 1 P. Wms. 563; S. C., 2 Vern. 758; Prec. Chan. 453.
- (b) 1 Ball & B. 1. (c) 7 T. R. 555.
- (d) 7 T. R. 589.
- (e) 1 K. & J. 156; S. C., 24 Law Jour., Ch., 117.
- (f) 1 Sim. & St. 684.
- (g) 1 Col., C. C., 44; S. C., 1 H. L. Cas. 406.
- (h) 19 Beav. 176; S. C., 1 Jur., N. S., 33; 24 Law Jour., Ch., 161.
- (i) 7 Ex. 820; S. C., 16 Jur., 550; 22 Law Jour., Ch., 513.
- (k) 2 K. & J. 194; S. C., 2 Jur., N. S., 578; 25 Law Jour., Ch., 513.
- (l) 2 Sch. & Lef. 456. (m) 1 Russ. 521.

T. T. 1858. necessary for the understanding of the case, is as follows:—In the
Queen's Bench year 1765, George Reynolds was seised and possessed of the entire
PEYTON of the Loughscur estate; he has been in the argument called George
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Nugent Reynolds the younger, who has been called in the argument
George the second. This George the second died in the year 1787,
leaving three children, viz., his only son, George Nugent Reynolds,
the grandson, who has been called in the argument George the
third, and two daughters, Mary Anne and Bridget. George the
third died in the year 1802, without issue, leaving his two sisters
his co-heiresses-at-law. Mary Anne was twice married, first to
Colonel Peyton, by whom she had two children, namely, John
Reynolds Peyton, the father of the plaintiff Richard Reynolds
Peyton, and Jane, who married John Lambert, and who, with her
husband, are the defendants in this record. Colonel Peyton died
in the year 1805; and, in the year 1817, Mary Anne, his widow,
intermarried with Major Richard Macnamara, her second husband;
and of this marriage there was no issue. Major Macnamara died
in the year 1848, leaving Mary Anne, his widow, him surviving.
Bridget Reynolds intermarried with Richard Young, who took the
name of Reynolds; and of this marriage there was no issue. Brid-
get Reynolds died in the year 1842; and her husband, Richard
Young Reynolds, died in 1848. On the 23rd of November 1836,
John Reynolds Peyton intermarried with Alicia Ennis, and died
in the year 1850, leaving the plaintiff, Richard Reynolds Peyton,
his son and heir. In the year 1855, Mrs. Macnamara died.

This case turns altogether upon the construction of the deeds and
wills which were given in evidence at the trial. A verdict was
directed for the plaintiffs; but, by consent of the parties, and with
the sanction of the learned Judge who tried the case (Mr. Justice
CHRISTIAN), the verdict was ultimately to be entered for the party
who should, in the opinion of this Court, be entitled thereto.

Having heard the case very ably and elaborately argued, my
opinion is, that the plaintiffs are entitled to a verdict for the whole
of the premises comprised in the ejectment; and I shall now state
the grounds upon which I entertain that opinion. I shall not,
for the present, notice the peculiar circumstances of the sixteen

denominations which I have referred to, but shall consider the case with reference to the bulk of the property which is the subject of this action, and as if all the ninety denominations rested upon the same derivative title. There are three documents, upon the construction of which the decision of this case must turn; these are the will of 1783, the will of 1795 and the deed of 1836. Upon the will of 1783 the main question in the cause arises; and that is, what estate did George the third take under the will of 1783? The defendants contend that, under this will, George the third took an estate tail; the plaintiffs contend that he took an estate for life only. I think that the plaintiffs' is the true construction.—[His Lordship here read the will of George N. Reynolds (George the second), 1783.]—Now I think, upon the reading of this will, it is manifest that the testator's principal object and intention was, to keep the Loughscur estate in the name and blood of Reynolds as long as possible. It is equally clear that it was with that view and for that purpose that he gave, after the life estates devised to his son and daughters, successive life estates to the unborn sons of his own children, with estates in tail to the children of those unborn children. This kind of limitation, as tending to perpetuity, the law will not permit. Accordingly, if we were to construe this will strictly according to its terms, all the limitations after the life estates would be void for remoteness, and the necessary result (giving effect to the law upon this subject) would be to defeat the main object and intent of the testator, which was to continue the estate in his family and name as long as the law would permit. In order to prevent this result, the defendants' Counsel would construe this will as giving an estate tail to George the third; but it appears to me that this construction is plainly inadmissible. By giving an estate tail to George third, the testator's primary object would be altogether frustrated, since, by a recovery or disentailing deed, the first taker, George third, could have at once made himself owner of the fee-simple, and thus destroyed all the laboriously framed limitations of the will. The only mode, as it appears to me, by which the main, the ruling intention of the testator can be accomplished, is, to apply the *cy pres* doctrine to this will. That doctrine is founded upon

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T. T. 1858. the rule that the primary, the paramount intention of the testator
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expressed by the terms of the will. The Court, in its interpretation of the instrument, does for the testator that which he probably
would have done for himself, had he been aware of the impracticability of reconciling the main object of his will with the subordinate limitations which he had in view. Numerous cases there are upon this subject, from *Humberston v. Humberston* (*a*) and *Pitt v. Jackson* (*b*), down to *Vanderplank v. King* (*c*), which is quite in point with the present case. In *Vanderplank v. King*, there was a devise to the daughter of the testator, for her life, with remainder to her unborn child, for life, with remainder to the children of the unborn child, in tail. Vice-Chancellor Wigram thought it right to apply the *cy pres* doctrine to that case, and says (p. 10):—“I have considered the question during the argument, with reference to the *cy pres* doctrine, and, upon that part of the case, I do not think that I am at liberty to exercise any discretion. That point is now sufficiently simple and is well established, though sometimes of difficult application.” He then examines the cases referred to, and, again taking up the case before him, after consideration, he reiterates the doctrine which I have just stated, as the ground upon which he decided that particular case. That case is a leading one upon the subject—one which has not been questioned, and upon which I might very well find the opinion I entertain upon this part of the testator’s will. Now, in this will we have the general and paramount intention of the testator, that the estate shall not go over as long as there shall be male descendants of his son and daughters. This intention may be carried out, and can be carried out only, not by giving life estates to the unborn children of the tenants for life then *in esse*, but by giving them estates tail; and thus, without violating the rule against perpetuities, we are enabled to carry out the main object and intention of the testator. I think, therefore, that, under the will of 1783, George third took only an estate for life, with remainder to his first and other sons, in tail male,

(*a*) 1 P. Wms. 332.

(*b*) 2 Bro. C. C. 51.

(*c*) 3 Hare, 1.

and that, on his death without issue, his sisters took an estate for life each, as tenants in common, with remainder, as to a moiety, to their first and other sons, in tail, with cross remainders over.

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This being so, the will of 1795 could not affect the main body of the Loughscur estate; it could only affect those denominations of which the then testator, George the third, was seised in fee.—[His Lordship here read the will of George N. Reynolds (George the third), of 1795.]—By this will of 1795, it appears to me that the sisters Bridget and Mary Anne took each an estate tail in common, with cross remainders over, the reversion in fee being limited to one Hugh Connell.

We have nothing to do here with Mary Anne's moiety; that moiety, we are given to understand, was disposed of by a suit in Chancery.* Our concern now is with Bridget's moiety. Taking then Bridget to have been tenant in tail of her moiety in the year 1836, we find that in that year two deeds were executed, the effect of which we have now to consider. Upon the marriage of John Reynolds Peyton in that year, a marriage settlement, dated the 23rd of November 1836, was executed by the parties thereto, and, amongst others, by Richard Young Reynolds and Bridget his wife. Contemporaneously with this settlement, a second deed, of the same date, was executed by Mrs. Reynolds and her husband; this has been called the disentailing deed; but the effect of both deeds plainly was, reserving her life estate to Mrs. Reynolds, to vest the fee of her moiety in trustees, to the uses of the marriage settlement. The plaintiff R. B. Peyton is the eldest son of that marriage, and tenant in tail under the settlement. It was vainly contended by the defendants' Counsel that, inasmuch as the settlement of 1836 was not acknowledged by Bridget Y. Reynolds, before a Judge or a Commissioner, that it was inoperative as to her, and those deriving under her; but the answer to that argument is, that the disentailing deed of the same date with the settlement was acknowledged regularly before a Judge, and with the manifest view of assuring to the uses of the settlement the moiety in question: so that the conclusion upon the whole is, that the plaintiffs are now entitled to the

* See note, p. 489.

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I concur in the clear and satisfactory judgment which has been pronounced by my Brother CRAMPTON.

The first question raised upon the will of George Reynolds the second (1783) was, as to the application of the *cy pres* doctrine to the limitations in favour of testator's son, George Reynolds the third, and his sons. The cases to which my Brother CRAMPTON has referred show clearly that the doctrine is applicable to those limitations; but defendants' Counsel contend that the result of such application would be to give an estate in tail male to George the third, instead of giving to his first and other sons successively, as purchasers, estates in tail male, in remainder expectant upon his life estate. In my opinion, such a proposition cannot be maintained, consistently with the nature and principles of the *cy pres* doctrine. That doctrine has been applied by the Courts to limitations such as those in question, for the purpose of effectuating, as far as possible, a testator's general intention to preserve his property in a family, and for the purpose of preventing the total disappointment of that intention by the rule against perpetuities. If, for example, lands be devised to an unborn person, for life, with remainder to his sons, in tail, then (as such limitations in remainder are void and incapable of taking effect in the manner intended), the doctrine of *cy pres* gives to the unborn devisee for life the estate in tail, which was designed for, but could not be legally given to his sons, and which estate tail, so given to the devisee for life, would (if not barred) comprise in its devolutions by descent all the persons intended to have been made tenants in tail by purchase.

In the first part of the will of 1783, the limitations are "to *George Reynolds the third* (who was then unmarried), *for his life, with remainder to his first son, for his life, with remainder to the sons of such first son successively, in tail male.*" In that

part of the will there are no limitations to the second and other sons of George Reynolds the third; but I am of opinion (and it has indeed been conceded in the argument), that the limitations in favour of the second and other unborn sons of George the third and their sons, which are contained in the subsequent clause of the will, that commences with the words, "*and to prevent any misunderstanding,*" should (though differing in some respect from the limitations in favour of the first unborn son and his issue) have the same effect as if the first part of the will had contained express limitations in their favour, similar to those contained in favour of the first unborn son and his sons.

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Now, as estates in tail in remainder expectant upon the life estate of the unborn sons of George Reynolds the third could not be legally given to their sons respectively, I think it clearly follows, from the principle above stated, that the *cy pres* doctrine should be applied by giving to the unborn sons of George Reynolds the third the estates tail which were designed for, but which could not be legally given to, their first and other sons. What authority or reason is there for applying the *cy pres* doctrine (as contended for by defendant), so as to give an estate tail to George Reynolds the third? He took an estate for life under the will; the limitation of an estate for life, to his first and unborn son was valid in itself; but the limitation of estates tail in remainder to the sons of such unborn son was invalid, though an estate tail might have been legally given, by express words, to such unborn son himself. It is necessary, for the purpose of effectuating the testator's general intention, and of observing the rule against perpetuities, that we should (as contended for by plaintiffs' Counsel) substitute an estate tail in such unborn son for the life estate and the invalid estates tail in remainder, which were intended to be devised to him and to his issue; but it is *not* necessary, for the foregoing purpose, that we should (as urged by defendants' Counsel) adopt such a construction of the will as would substitute an estate tail in George Reynolds the third, for the life estate expressly given to him, and the remainders over to his sons and grandsons. This latter construction would not only depart, more than is necessary,

T. T. 1858. from the express limitations of the will, but would tend to the further disappointment of the testator's general intention, by unnecessarily accelerating the period at which such intention could be defeated; as (if George Reynolds the third took an estate tail under the will) he could, by suffering a recovery, destroy the limitations over, and alienate the property from the family, at a much earlier period than could be done by his sons. I am, therefore, of opinion that the construction contended for by defendant, as to the *cy pres* doctrine, cannot be maintained, and that, under the part of the will to which I have referred, George Reynolds the third took an immediate estate for life, with remainder to his first and other sons successively, in tail male.

The defendants' Counsel, however, next contended that even if George the third took under the will an immediate estate for life only, with remainder (by the application of the *cy pres* doctrine) to his sons, in tail male, yet that the effect of the words in the will, "*and in case my said son George shall die without leaving issue male of his body lawfully begotten*" (which precede the limitations to testator's daughters), is to give George the third an estate in tail male, in remainder expectant upon the estates in tail male given to his sons. Now, although in many cases, where a devise to a party is followed by a limitation contingent upon "*the failure of his issue*," or upon "*his dying without issue*," and the effect of these words, or of expressions of a similar import, has been to give an estate tail, by implication, to that party; yet it has been settled that, where those expressions (even without the word "*sue*" being used) are preceded by a devise to the issue of that party, which embraces, in its terms, *all* the issue whose failure is contemplated, then the words importing a failure of issue should be construed as if the word "*sue*" had been used, as referring to the objects of the prior devise, and not to issue at large, as intended to provide for the failure or determination of the estates previously given to the issue, and not to give an estate tail, by implication, to that party. This principle is established by the case of *Baker v. Tucker* (*a*), and several

(*a*) 11 Ir. Eq. Rep. 102; S. C., H. L. Cas. 106.

other cases cited in the argument. In the will now before us, the words importing a failure of the issue male of George the third are preceded by a devise which, under the *cy pres* doctrine is (as I have already stated) to be construed as a devise to his first and other sons successively, in tail male. This devise embraces, in its terms, all his issue male; and it follows, therefore, that the words in question have not the effect of giving George Reynolds the third an estate tail by implication, but only denote the event upon which there would be a failure or determination of the estates in tail male, previously given to the sons of George Reynolds the third.

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The limitations next contained in the will are those to the testator's daughters Bridget and Mary (who were also then unmarried), for their respective lives, as tenants in common, with remainder, as to each daughter's share, to her first son (then unborn), for his life, with remainder to the sons of such first unborn son successively, in tail male; and in the subsequent part of the will to which I have already referred, he directs that the like rules should be observed with respect to the second and other sons of his daughters, as he had directed with respect to the second and other sons of George Reynolds the third. I think (for the reasons I have already stated) that, by the application of the *cy pres* doctrine, Bridget and Mary took, under these limitations, life estates only in their respective moieties, with remainder to their respective first and other sons successively, in tail male. I think also, that, by the subsequent limitation, in the nature of cross remainders, each sister would (upon the determination of the life estate and estates tail given to the other sister and her sons as aforesaid) take an estate for her life, with remainder to her sons successively, in tail male, in that other sister's moiety.

The will then contains a limitation to the daughters of George Reynolds the third. It is necessary to consider its construction, because, though the limitations to the sons of Bridget and Mary (under which the plaintiff claims) are contained in a prior part of the will, yet the testator, by his codicil, declares that the limitations to the issue female of George Reynolds the third should operate in priority to the limitations to the issue male of Bridget and Mary.

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"Daughters of my said son George, as tenants in common, and
"not as joint tenants, under the same limitations and restrictions
"as I have hereinbefore devised the same to my said daughters
"Bridget and Mary, and their issue." This limitation is inaccurately drawn, and could not be carried out in the particular manner expressed. If the testator had repeated in it the precise terms of the preceding limitation to Bridget and Mary and their issue, the result would be an attempt to give to the unborn daughters of George the third estates for life, in their respective shares, as tenants in common, with remainder, as to said respective shares, to the first and other sons successively of each unborn daughter, for life, with remainder to the first and other sons of such sons successively, in tail male. Such a devise could not, of course, be carried out according to its terms. It would be a further violation of the rule against perpetuities, by attempting to interpose life estates in the sons of the unborn daughters between the life estates of those daughters and the estates tail purported to be given to the sons of those sons. It has not, however, been suggested by the defendant's Counsel that the peculiar form of this limitation creates any greater difficulty, in the application to it of the *cy pres* doctrine, than exists in the application of that doctrine to the limitations in favour of Bridget and Mary and their issue male; and I am of opinion that, by the application of that doctrine to the limitations in favour of the daughters of George Reynolds the third, and having regard to the testator's general intention, as collected from other parts of the will, the result would be to give to the daughters of George Reynolds the third estates in tail male, in their respective shares, as tenants in common, with cross remainders between them. In this view of the case, the limitations of estates in tail male, which (as I have already stated) were given to the sons of Bridget and Mary, by the preceding parts of the will (but which were, by the codicil, postponed to the limitations in favour of the daughters of George Reynolds the third), would not, as contended for by the defendant's Counsel, be void for remoteness.

The parts of the will to which I have referred were those principally relied on in the argument; and I do not think that, for the purposes of this case, their construction is affected by the devise in the codicil to the testator's wife for her life, with remainders over in the event of all the testator's children dying without issue.

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Part of the plaintiff's claim in this ejectment is for Bridget's moiety of the fee-simple lands of George Reynolds the second, which passed by the said will and codicil of 1783. It appears that George Reynolds the third died without ever having had any issue; and, therefore, according to the foregoing constructions of the said will and codicil, the plaintiff's father (who was the only son of Mary) became entitled to an estate in tail male, in Bridget's moiety, in remainder expectant upon the death of Bridget and of Mary, and upon the failure or determination of the estates in tail male given to the sons of Bridget, in that moiety. By the disentailing deed and settlement of November 1836, executed on the marriage of the plaintiff's father (who has since died), his said estate was barred, and Bridget's moiety was settled to the uses mentioned in said settlement. Bridget died in 1842, without ever having had any issue; Mary died in 1855, and the plaintiff, under the uses of that settlement, is now entitled to Bridget's moiety of said fee-simple lands of George Reynolds the second.

The residue of the lands mentioned in the ejectment were the fee-simple estates of George Reynolds the third; and the plaintiff claims also to be entitled to Bridget's moiety of those lands, under the will of George Reynolds the third (dated in 1795), and under the disentailing deed and settlement of November 1836; contending that Bridget took, under said will of 1795, an estate tail in her said moiety. The defendants, on the other hand, contend that, under said will, Bridget took in her moiety an estate in fee-simple, with an executory devise over to Mary, in tail, in the event of Bridget dying *without issue living at her death*; that, as such event happened, Bridget's estate determined, and that the executory devise to Mary was not affected by the disentailing deed or settlement of 1836. In my opinion, the construction of this will contended for by the plaintiff's Counsel is correct. The testator in the first part of his will gives "*all his real and personal estate*" to his sisters Bridget

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and Mary, share and share alike. This would have given ~~the~~ estate in fee in her moiety of the real estate; but there is a clause whereby testator, "in case Bridget should happen without issue," bequeaths her moiety of his real and personal to her husband, Richard Young, for his life, "and to descend directly upon his death to Mary and her issue." Now as a rule, respecting wills made before 1837, if a devise of land party in fee be followed by a limitation over, in the event of party "dying without issue," those words are construed as implying an indefinite failure of issue, and as giving to that party estate tail by implication, instead of the estate in fee, which would have taken under the preceding devise. I admit, however, there are several cases where the words importing a failure of issue in the party taking an estate in fee under the preceding devise were (by force of other expressions in the will) restricted to a failure of issue at the death of that party, or at some other period, and were accordingly held to have the effect, not of creating an estate tail in that party, but of subjecting his previous estate in fee simple to an executory devise over, in the event of the failure of his issue occurring at his death, or at such other period. In the case now before the Court, the devise of a life estate to Richard Young, in the event of Bridget dying without issue, and the direction that her moiety should descend immediately upon his death to Mary and her issue, are relied on by the defendant's Counsel as grounds for adopting the restricted construction of the words "dying without issue," instead of giving them their legal and natural construction. Now the circumstance of a subsequent devise of lands for life is not of itself sufficient to confine the failure of issue to a failure at the death of the first taker. Estates for life are frequently limited in remainder after estates tail. In the case of *Roe v. Jeffrey* (a), which was relied on by the defendant's Counsel, all the subsequent devises were of life estates; and in the subsequent cases of *Barlow v. Salter* (b) and *Doe v. Owen* (c), the authority of the decision in *Roe v. Jeffrey* has been confined to cases where that state of fact occurs. That case does not, therefore, govern the case now before the Court,

(a) 7 T. R. 580.

(b) 17 Ves. 483.

(c) 1 B. & Ad. 321.

This will in the will of 1795, there are devises in tail and in fee, subsequent to the devise of a life estate to R. Young. With respect to the case *Bridget v. Richard Young*, it is directed that, in the event of Bridget dying without issue, "her moiety of her estate should descend immediately on the death of Richard Young for his life," and "to Mary and her issue," cases have been cited in which expressions, referring to the death of the party whose issue was to fail, have been held as restricting the import of the words "dying without issue," to a failure of issue at the death of that party; but in the case now before the Court, the words "descend immediately" refer to the death of Richard Young, and not to the death of Bridget; and it has not been contended by the defendant's Counsel that the words "dying without issue" could be restricted to a failure of her issue at the death of Richard Young.

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The defendant's Counsel have also relied on the circumstance that the testator's real and personal estate are included in the same devises and clauses of his will. But this is no ground for giving to the words "dying without issue" the restricted construction as regards the real estate, though we should give them that construction with respect to the personal estate. It has been decided in *Forth v. Chapman* (a), and other cases, that where real and personal estates are devised in the same clauses and by the same terms, a different construction may be given to the words "dying without issue" (or to similar expressions), as regards the real estate, from what is given to them as regards the personal estate.

There are other limitations in the will of 1795, which, in my opinion, furnish grounds for our adopting the natural instead of the restricted construction of the words in question, and for our holding that Bridget took an estate tail in her moiety of the real estate. Supposing it should be held (as contended for by the defendant) that Bridget and Mary took in their respective moieties estates in fee-simple, with executory devises over in the event of their dying without issue living at their respective deaths, it is admitted (even on such a construction) that, if either of them died without issue living at her death, the other sister would, under the devise "to her and her issue," take an estate tail in the moiety of that sister so

(a) 1 P. Wms. 663.

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dying. There is then in the will a limitation of the entire real estate to H. Connell, in fee, in the event of both sisters "*dying without issue.*" Now what construction is to be given to those words, as applied to this devise to Connell? They are immediately preceded by limitations of an estate tail to each sister in the moiety originally devised to the other sister; and, having regard to those limitations alone, the natural and obvious construction would be, that the testator intended that the failure of issue, upon which the property was to go over to Connell, was to be identical with that on which the immediately preceding estates were made determinable, namely, an indefinite failure of issue. But, in order to avoid the objection of putting different constructions upon the same words in different parts of the will, the defendant's Counsel contend, that the words "*dying without issue,*" as applied to the limitation of the entire real estate to Connell, should receive the same restricted construction as in the limitation of Bridget's and Mary's moieties, and should be construed as meaning "*dying without issue at their respective deaths.*" The result then of the entire will, according to the defendant's construction, would be, as to one moiety, a devise to Bridget, in fee, with an executory devise over (in the event of her dying without issue living at her death) to Richard Young, for life, and then to Mary, in tail, and with a further executory devise over to H. Connell, in fee, in the event of Mary also dying without issue living at her death; and as to the other moiety, a devise to Mary, in fee, with an executory devise over (in the event of her dying without issue living at her death) to Bridget, in tail, with a further executory devise over (in the event of Bridget also dying without issue living at her death), to Richard Young, for life, and then to H. Connell, in *fee*. Such devises could, no doubt, have been legally made by the testator; but it will be found that, by adopting this construction, results would follow which could hardly be considered as consistent with the testator's intention, or as having been contemplated by him. In the event (which has actually happened) of Bridget dying in Mary's lifetime, without leaving issue living at her death, then, according to the defendant's construction, Mary would (subject to Richard Young's life estate) take an estate tail in Bridget's moiety, with an executory devise over to H. Connell, in fee, in the event of her dying without

issue living at her death; and by suffering a recovery she might defeat that executory devise, and acquire the absolute interest and fee-simple in Bridget's moiety; whereas, in her own original moiety, she would have only an estate in fee determinable upon the same event of her dying without issue at her death, and with an executory devise over, on that event, to H. Connell, in fee, which she could not defeat. It is not likely that the testator contemplated such a result. It was more probably his intention that, if either sister became entitled to the moiety of the other sister, she was to have the same estate in and dominion over that other moiety as she had got in her own original moiety. Suppose again, that after the death of Bridget, without leaving issue at her death, Mary died leaving issue at her death (but without having suffered a recovery), then, according to the defendant's construction, the executory devise to H. Connell as to both moieties would be defeated and incapable of taking effect. Mary's estate in fee in her own original moiety and her estate tail in Bridget's moiety would become absolute; but the reversion expectant in that event upon her estate tail in Bridget's moiety would have been undisposed of by the will, and, if Mary's issue afterwards determined, without a recovery being suffered, Bridget's moiety would revert to the testator's heir-at-law, namely, to the heir of Bridget and Mary themselves. Such a result could not be considered, as in accordance with the testator's intention, which appears to have been to provide for every contingency, and to dispose of the entire interest in his real estate. Other results might also follow, from the defendant's construction of the will, which would be equally at variance with the testator's apparent intention.

The defendant's Counsel have also referred to the terms of the limitation of Mary's moiety, "that in case she should die without issue, *then* her moiety was to descend *upon her death* to Bridget and her "issue," and have relied upon the expressions "*then*," and "*upon her death*," as giving the restricted construction to the words "dying without issue" in that part of the will, and as affording an explanation of their import in the previous part relating to Bridget's moiety. Considering, however, the other limitations of the will, to which I have referred, I think that, although the expressions relied on by the defendant's Counsel have in some cases had the

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T. T. 1858. effect for which they contend, yet that, in the present case we
Queen's Bench should regard those expressions as having been used by the testator
PEYTON to denote that the limitation to Bridget was to take effect immediately after or upon the failure of the estate which Mary took under the preceding limitation, and under the words, "*in case she shall die without issue,*" and not as intended to fix the death of Mary as the period for ascertaining whether her estate would determine or become absolute: *Walter v. Drew* (a).

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It appears to me, upon the whole of the will, more in accordance with the testator's intention, and the purposes he had in view, to hold that he intended to give to each sister similar estates in her original moiety, and also in the moiety of her sister, when the same should accrue to her, and that he did not intend to use the words "*dying without issue*" in a sense different from their ordinary and legal construction of an indefinite failure of issue. I am accordingly of opinion, that each sister took an estate tail in her original moiety, with remainders, as to Bridge's moiety, to R. Young for life, then to Mary in tail, and then to H. Connell in fee, and with remainder, as to Mary's moiety, to Bridget in tail, then to R. Young for life, and then to H. Connell in fee. I do not think that the bequest of a life annuity to P. Brennan, in the event of the devise to Connell taking effect (which has been also relied on by the defendant's Counsel), furnishes any sufficient argument against this construction, as such an annuity might well be limited after the determination of previous estates tail.

The defendant's Counsel have further contended that, even supposing Bridget took, under the will of 1795, an estate tail in the fee-simple lands of George Reynolds the third, yet that the plaintiffs are not entitled to that moiety, under the disentailing deed and settlement of November 1836, inasmuch as the settlement, though executed by her, was not also acknowledged by her, pursuant to the Fines and Recoveries Abolition Act (she being then a married woman). It appears, however, that the disentailing deed was duly acknowledged by her under the statute. That deed, though bearing the same date, appears to have been executed subsequent to the set-

(a) Comyns, 372.

tlement. It recites the settlement, and that the lands were thereby conveyed "to the uses, trusts, &c., in said settlement expressed." It also recites that Bridget and her husband had thereby covenanted to execute such further assurance, whether in the nature of a fine or recovery, or otherwise, as should be requisite for more effectually assuring the lands to the uses and trusts of the settlement. The disentailing deed then conveys the lands to the uses, &c., already declared by the settlement. I think it clear, therefore, that it was not necessary that the settlement should be also acknowledged by Bridget under the statute. The uses and trusts, &c., declared by it were as effectually incorporated in the disentailing deed, by reference and recital, as if they had been repeated in terms in the operative part of that deed. With respect to the reservation clauses in the disentailing deed and settlement, which were relied on by the defendant's Counsel, I think they only referred (as regards Bridget's and Mary's estates) to the life estates to which under the will of 1783 they were entitled in Bridget's moiety of the fee-simple lands of George Reynolds the second, in priority to the estate tail of the plaintiff's father, but did not affect his rights to any of the lands on the death of Bridget and Mary.

The plaintiffs are, therefore, now entitled to Bridget's moiety of all the lands mentioned in the ejectment.

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BAKER v. MILWARD and others.

May 10.
T. T. 1858.
June 12.

(*Common Pleas.*)

A, a parliamentary agent, sued B, for work and services, in obtaining the passing of a Private Act of Parliament. B. pleaded that it was part of A's "the Town of New Ross, and for maintaining the same free of employment to prepare and "toll," and for other purposes, at the request of the defendants, submit to Parliament a clause in the bill for providing for the payment of the costs of passing said bill, to be raised in pursuance of same; and that, by reason of the carelessness, negligence, unskillfulness and default of A, the said clause was so incorrectly framed, that after the passing of the Act containing such clause, it became impossible to enforce the payment of the said costs in the manner thereby contemplated.—*Held*, upon demurrer to the plea, that the omission of the plaintiff to prepare an efficient clause for the above purpose materially affected the quality of the entire work, so as to exclude the possibility of a part performance, and consequently, that the matter of the defence was a good bar to the entire action, and did not merely go in reduction of damages.

Held also, that the fact of the imperfect clause having received the sanction of the Legislature did not excuse the act of A, in having prepared and submitted same for their adoption.

neys, and advanced the moneys, and provided the materials in the summons and plaint mentioned, and not otherwise; and the plaintiff did accordingly prepare and submit to Parliament, as part of the said bill, the draft of a clause purporting to provide for the payment of the costs of the passing of the said bill, out of moneys to be raised as aforesaid, to wit, the clause which afterwards passed into a law, and which now is the 13th section of the Act of Parliament in the summons and plaint mentioned. That by reason of the carelessness, negligence, unskillfulness and default of the plaintiff, the said clause was so incorrectly, insufficiently and inadequately framed, that although the same was adopted and passed by the Legislature, and became, and was and is, part of the said Act of Parliament as aforesaid, and although the costs and expenses in and about the obtaining and passing through Parliament of the said Act, to wit, the costs and expenses, and all other matters and things sought to be recovered in this action, were, by the said clause and section, directed to be paid by the respective treasurers of the counties of Kilkenny and Waterford, out of the cess collected, or to be collected, for the barony of New Ross, in the county of Wexford, and such portions of the barony of Ida, in the county of Kilkenny, as are comprised in the schedule to the said Act; yet, by reason of the said carelessness, &c., of the plaintiff, it became, and was and is, impossible to enforce the payment of the said costs and expenses from the said treasurers of the counties of Kilkenny and Wexford, or either of them, or to obtain payment thereof out of the said cess, pursuant to the provisions of the said section; that the alleged liability of the defendant to the said costs was occasioned by the carelessness, &c., of the plaintiff, whereby it became impossible to enforce the payment of the said costs, or recover the same as aforesaid, and not otherwise.

The plaintiff demurred, because it was not alleged that defendants derived no benefit from plaintiff's work and services, or that such were useless to them; and because such neglect and default, as alleged, went merely in reduction of damages claimed, and were not a bar to the plaintiff's action; and that the defect complained

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MILWARD. *Coffey and J. E. Walsh*, in support of the demurrer, contended, first, that the defence did not allege that the defendants derived no profit whatsoever from the plaintiff's services, and, consequently, that he was entitled to recover *pro tanto*, the alleged default going merely in reduction of damages. Secondly, that the omission complained of was the act of the Legislature, for which the plaintiff was not responsible. They cited *Templer v. M'Lachlan* (a); *Farnsworth v. Garrard* (b); *Deneu v. Daverell* (c); *Dax v. Ward* (d); *Hill v. Featherstonhaugh* (e).

Devitt and Lynch, contra, cited *Mondell v. Steel* (f); *Potts v. Sparrow* (g); *Huntley v. Bulwer* (h); *Bracey v. Carter* (i); 2 Sm. Lead. Cases, 14, *et seq.*

Cur. ad. vult.

T. T. 1858. BALL, J.,[†] delivered the judgment of the Court.

June 12.

This was a demurrer to the defendants' second defence to the summons and plaint in this action; and it has been argued before my Brothers KEOGH and CHRISTIAN and myself, during the Sittings of my LORD CHIEF JUSTICE at Nisi Prius, after last Easter Term. The plaintiff, in his summons and plaint, claimed a sum of £813. 0s. 9d., as due to him by the defendants, for work done, and services performed by him for the defendants, as a parliamentary agent, in obtaining and passing through Parliament a certain Private Act, and

(a) 2 N. Rep. 136.

(b) 1 Camp. 38.

(c) 3 Camp. 451.

(d) 1 Stark. 419.

(e) 17 Bing. 569.

(f) 8 M. & W. 869.

(g) 6 P. & C. 729.

(h) 8 Sco. 325.

(i) 12 A. & E. 373.

* NOTE.—The plaintiff also obtained liberty to reply to the foregoing defence, and a verdict was subsequently found in his favour, upon the issues in fact.

† MONAHAN, C. J., was absent at Nisi Prius during the argument.

for moneys advanced by him, and fees due to him by the defendants, in respect of such work and services. The defendants, by their second defence to this summons and plaint, averred that the plaintiff had been retained by them as a parliamentary agent, to solicit the passing through Parliament of a certain private bill, and to prepare and submit to Parliament a draft thereof, containing (among other clauses) a clause which should make effectual provision for the payment of the costs, charges and expenses of the passing of the said bill, and of certain moneys to be raised in pursuance or under or by virtue thereof, if the same should be passed through the Legislature, and become an Act of Parliament; and they further averred, that the work and services, in respect of which the plaintiff claimed remuneration by his said summons and plaint, were done and performed by him in alleged pursuance of his said retainer by the defendants. They then averred that the plaintiff did prepare and submit to Parliament, as part of the said private bill, the draft of a clause purporting to provide for the payment of the costs of the passing of the said bill, out of the moneys to be raised as aforesaid; and that the Legislature did in fact pass the bill, containing the clause so prepared by the plaintiff; but that by reason of the negligence and unskilfulness of the plaintiff, the said clause was so incorrectly and inadequately framed, that although the same was adopted and passed by the Legislature, it was impossible to enforce payment of the aforesaid costs and expenses out of the funds which the said clause purported to charge therewith; and the defendants further averred, that the alleged liability of the defendants to the claim of the plaintiff, in this action, was occasioned by the negligence and unskilfulness of the plaintiff, as aforesaid.

To this second defence the plaintiff has demurred, and the grounds of the demurrer are in substance twofold: first, that it is not alleged by the said defence that the defendants derived no benefit whatever from the plaintiff's work and services, and that the negligence and unskilfulness of the plaintiff complained of, and thereby relied on, go merely in reduction of damages, and are no bar to the action; and secondly, that the defect complained of is the act of the Legislature, and not of the plaintiff, and for which the plaintiff is not respon-

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T. T. 1858. *CommonPleas.* sible. As to the first ground of the demurrer, it is to be observed that the general principle on this subject is now well established that, whenever a special contract remains open, that is, whenever something which the plaintiff ought to have done remains unperformed by him, he cannot sustain either a special action on the contract, or an action of *indebitatus assumpsit*, in respect of anything which he may have done in alleged accordance with it. In the note to *Cutter v. Powell* (a), to which we have been referred at the Bar, this general principle is shown to have been established by the authorities there cited. However, there is an exception to this general rule (now equally well established), which appears to have been first acted on by Lord Ellenborough, in the Court of King's Bench in England, in the case of *Basten v. Butter* (b); which is this, that where some benefit has accrued to the defendant, and been accepted by him, by reason of the plaintiff's part performance of the special contract, the former is not at liberty, in bar of the action, to rely upon the non-performance of the entire of what the plaintiff has bound himself to do; but he may give in evidence such non-performance on the part of the plaintiff, in reduction of the damages which would otherwise have been recoverable. In the subsequent case of *Farnsworth v. Garrard* (c), Lord Ellenborough again acted upon that doctrine, and stated that he had a conference with the Judges, and he considered the correct rule to be that, if some benefit has been derived by the defendant from the plaintiff's services, though not to the extent to which the latter was bound by the contract to have afforded it, his demand shall be reduced proportionably, and his claim shall be co-extensive with the benefit he shall have conferred. The defence filed here relies upon the general rule above-mentioned, that, by reason of the default of the plaintiff, in the preparation of the clause in the Act of Parliament, whereby the defendants were to be indemnified against the costs and expenses incident to the passing of the said bill, they had altogether lost the benefit of the said indemnity, and therefore the plaintiff was not entitled to sustain his action; whereas the plaintiff's demurrer to that

(a) 2 Sm. L. C. 19.

(b) 7 East, 479.

(c) 1 Camp. 38.

defence insists that he is entitled to sustain his action, under the T. T. 1858.
exception to the general rule above pointed out, inasmuch as it
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is not alleged by the defence that the defendants derived no benefit
whatever from the plaintiff's work and services, rendered in alleged
pursuance of the contract set forth in the defence ; and that the default
of the plaintiff, thereby relied on, goes merely in reduction of
damages, and not in bar of the action. This leads me to consider
with what qualifications the exception to the general rule was first
introduced and has been subsequently accompanied. In *Farnes-*
worth v. Garrard, already referred to, which was an action of
assumpsit for the building of a house, the defence proposed to be
given in evidence was, that the house was so ill-constructed that
it was in danger of falling ; and it was objected that this was
the subject of a cross-action, and not as a defence to the plaintiff's
claim ; but Lord Ellenborough admitted the evidence, holding that
as the action was founded on a claim for meritorious services, the
plaintiff was entitled to recover what he deserved, and it was
therefore to be considered how much he deserved, or if he deserved
anything ; and he added, that if the defendant had derived no
benefit from his services, he deserved nothing, and there must be
a verdict against him. He further proceeded to say, after the
conference with the Judges, to which I before adverted, that he
considered such to be the correct rule, and that where there was
no beneficial service there should be no payment. In subsequent
cases the same doctrine has been uniformly acted on, and, I ap-
prehend, must be deemed undoubted law at this day ; and, accord-
ingly, I shall consider, by-and-by, whether the present should
be deemed a case where the defendants derived no benefit from
the plaintiff's alleged services ; and if so, the case comes within
the general rule, and not within the exception which would
entitle the plaintiff to recover, subject to the reduction of the
amount of his damages, corresponding to the extent of his de-
fault.

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But there appears to be a further qualification of the exception
in question, and that is, that the work in respect of which the
plaintiff seeks remuneration, as part of what he had contracted

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to do, and as being, to that extent, beneficial to the defendants, should be severable in its nature from the other part which he has omitted to perform, and independent of it; that is to say, that the effect of such omission should not be to alter the character of the work which the plaintiff has done, so that, by reason of such omission, the work so done constitutes no portion of the work he had contracted to perform, and which was the consideration of the defendants' promise to remunerate him, but is other and different work, which he had not contracted to do. Whenever this occurs, I take the exception not to apply, but the case to come within the general rule, so as to prevent the plaintiff from recovering at all. I come then to consider whether, with these qualifications of the exception, the present action is maintainable. The plaintiff insists that it is, because the defendants have obtained *some* benefit, though not to the extent he had contracted for, by the passing of the bill, and that in respect thereof he is entitled to remuneration. But we are of opinion that the defendants have obtained no part whatever of the benefit which the plaintiff had contracted to confer upon them, and which was the consideration of their engagement to remunerate him: and simply for this reason—the plaintiff's contract was to pass through Parliament a private bill which should cost them *nothing*, and the bill which he has procured to be passed is not *that*, but is a bill which, through his negligence and unskilfulness, has omitted to provide a fund for the expenses of passing it, whereby the defendants (as the plaintiff insists) have become responsible to him for the amount of those expenses, and he seeks to recover them accordingly in this action. No part whatever of the work done by the plaintiff was in respect of the passing of *the* bill for which he had contracted, and for which the defendants had promised to pay. The negligent omission of a sufficient indemnity clause in the Act that was passed, and which would have made it save its own expenses, had the effect of altering altogether the character of the work which the plaintiff did, which, instead of being a part performance of his contract, was altogether thrown away (so far as the defendants were interested) upon a subject-matter

with which they had no concern. Accordingly, this is not the ordinary case coming within the above exception, of remuneration sought in respect of a partial or inferior supply of an article contracted for, but remuneration in respect of a total failure of that article, and a substitution for it of something essentially different. The plaintiff's contract was to do an *entire* thing, to procure an Act of Parliament, the expenses of which were to be paid, not by the defendants, but out of another fund. No part whatever of the work the plaintiff did was in performance of that contract, and on what principle can he claim to be remunerated by the defendants for doing such work? *Sinclair v. Bowles* (*a*) appears to me to be a conclusive authority against the plaintiff's right to recover under these circumstances. But how much stronger the case is against the plaintiff, when we consider that it is *he*, who is suing the defendants for a demand, which by his own negligence and incapacity he has been the occasion of their being exposed to? Of course, *for the purposes of the demurrer*, these charges contained in the defence are taken as admitted by the plaintiff. Then can it be argued that, the very negligence and incapacity of the plaintiff, which are the occasion of the defendants' liability to be called on by him for payment, are not to be relied on by the defendants, and are no bar to his recovering from them in this action the fruits of his own wrong? One can understand cases being within the above exception, where there is no necessary connection between the amount of damages sought to be recovered by the plaintiff, and the amount claimed by the defendants, in reduction, on account of negligence; but when, as in this case, the sum sought to be recovered by the plaintiff must be precisely the amount of the reduction to which the defendants are entitled, in respect of the plaintiff's negligence, that is, where the reduction to which the defendants are entitled must extinguish the plaintiff's claim for damages, must it not be a bar to the plaintiff's action? For all these reasons, we are of opinion that the plaintiff's cause of action in this case does not come within the exception which prevents the plaintiff's negli-

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T. T. 1858. *Common Pleas.* gence being relied on as a bar to the action, and that it is within the general rule whereby a plaintiff is disabled from suing, either in a special action or one of *indebitatus assumpsit*, upon a contract whereof any of the terms which ought to have been complied with is left unperformed.

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Then the second ground of the plaintiff's demurrer remains to be considered; namely, that he, as a parliamentary agent, is not responsible in any way in respect of any defect in an Act of Parliament, the passing of which is the doing of the Legislature, and not of the agent who prepared the bill before it passed into law. To that reasoning we cannot at all accede. The plaintiff, as admitted by the demurrer, contracted to prepare such a clause as, if the Act should be passed, would be effectual for the indemnity of the defendants against the costs and expenses of passing it. The plaintiff did prepare a clause for that purpose, which was passed by the Legislature; but, by reason of his want of care and skill, that clause was wholly ineffectual for its professed purpose: and it is under such circumstances that we are told that the plaintiff is not to be responsible for the consequences of such incapacity and neglect. But an attorney who conducts a suit is responsible for the consequences of incapacity or want of care in the conduct of the proceedings, although the judgment pronounced is the act of the Court itself, and not of the attorney. We see no ground for distinguishing the case of a parliamentary agent from that of an attorney, in respect of such responsibility above-mentioned; and, therefore, we are opinion, that this second ground of demurrer is also unsustained.

Demurrer overruled.

H. T. 1859.
Exchequer.

BOYSE v. SIMPSON.*

(*Exchequer*).

Jan. 12, 14,
18.

In this case, *J. Kernan*, on behalf of the plaintiff, a judgment creditor of the defendant, had obtained, on the 3rd of December 1858, a garnishee order under the 63rd section of the Common Law Procedure Act, 1856, attaching a sum of £135, the amount of a dividend payable to the defendant out of the estate of Robert Scott, a bankrupt, and calling upon the official assignee of the Court of Bankruptcy and Insolvency, and the creditors' assignee, to show cause why they should not pay out of said dividend the amount of the plaintiff's debt. It appeared that an order had been, on the 30th November 1858, made in the bankruptcy matter, by Plunket, J., whereby it was ordered that the creditors of the said Robert Scott should be paid a dividend of four shillings and six-pence in the pound; and by the schedule framed on the basis of that order, it appeared that a sum of £121. 4s. was payable to the defendant.

A dividend payable by an assignee in bankruptcy to a creditor who has proved in the bankruptcy matter cannot be attached under the garnishee clauses of the Common Law Procedure Act 1856, by a judgment creditor of the person to whom such dividend is payable.

H. Pilkington, for the official assignee, now showed cause.

J. D. Fitzgerald and *J. Kernan*, for the plaintiff.

The arguments were substantially the same as those in *Gilmour v. Simpson*, supra, App. xxxviii.

Cur. ad. vult.

PICOT, C. B.

We are of opinion that the dividend in the bankrupt matter, which was attached by the garnishee order, is not a debt properly the subject of attachment under the garnishee sections of the

Jan. 18.

* Before PICOT, C. B., and GREENE, B.

H. T. 1859. Irish Common Law Procedure Act 1856, 19 & 20 Vic.

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If we should proceed at once to act on that opinion, must be, that we should not only discharge the condition on the assignee (the garnishee), to pay the dividend to his creditor, but we should set aside the whole a order. It is important that we should distinguish the re which we have formed the opinion just stated, from some grounds which have been urged in argument on the part of hishee.

In the first place it was objected, that the garnishee order made prior to the order and proceedings in the bankrupt by which the right of the bankrupt's creditor to present payment was completed; and that, on that ground, the dividend was a debt when the garnishee order was obtained. To this it is to me to be an answer, that if, when those proceedings were completed, the dividend (which was only a part of a debt previously due from the bankrupt) became such a "debt owing" to the assignee as could then be attached by a garnishee order, it was, at the least, a "debt accruing" when that order was obtained and was, as such, capable of being attached under the 63rd section. It is not disputed, upon this motion, that the amount of the dividend would, if not attached, be payable on demand, to the assignee, to the bankrupt's creditor, who was the original debtor in the garnishee proceeding.

Secondly; it was contended, on the part of the official assignee, that this dividend is not a debt at all "owing" by the assignee to the creditor, because, by reason of the 293rd section of the late Bankrupt Act, 20 & 21 Vic. c. 60, an action could not be maintained for its recovery. As to this argument, it appears to have been established by several decisions in England, prior to the 49 G. 3, c. 121, s. 12, that an action lay at the suit of the creditor against the assignee for the amount of a dividend declared and withheld. That statute, and each of the subsequent Bankruptcy Statutes, took away the creditor's right of action, by provision to which the 293rd section of the late Irish Bankrupt Act is analogous. But these enactments only took away the re-

medy; and it has been held, that the mere removal of the remedy by statute does not of itself necessarily annul the debt, or the contract, for which the remedy by action is withdrawn. It has been long so held in reference to the Statute of Limitations, the protection of which can only be applied by a plea in confession and avoidance, admitting the subsistence of the debt or contract, for recovery of which the statute displaces the right of action. So, in reference to the Statute of Frauds, it was held by the Court of Common Pleas in England, in *Leroux v. Brown* (*a*) (in opposition to some opinions expressed in previous cases, which the Court reviewed and considered), that under the 4th section of the statute (in this respect differing from the 17th), an agreement not evidenced by writing was not made null by that (4th) section, although, by reason of its not being so evidenced, a plaintiff is disabled from "bringing an action upon it." I should therefore be disposed to hold, that the attachment order could not be resisted on this ground alone.

Thirdly; it was further argued that the garnishee clauses do not apply, because a dividend in bankruptcy would not be liable to foreign attachment, under the customs of London, Bristol or Dublin. As to this argument; first, if such a dividend be not within the custom of foreign attachment, that may be so because the custom only applies to debts of such a nature that they could have existed in times coeval with the commencement of the custom, which was long prior to the Bankrupt Code. Secondly; I am not aware that a dividend withheld, which was a debt arising upon money had and received to the creditor's use, could not have been attached under the custom, prior to the 49 G. 3, c. 121: and thirdly; the garnishee clauses of the Common Law Procedure Act are not confined to cases to which the custom of foreign attachment formerly applied; for instance, I apprehend it is quite plain that, though a debt due on a record was not within the custom, a debt due by judgment may be attached under the statute, the procedure of which is entirely different from that of foreign attachment. The debt attached in *Hough v. Edwards* (*b*) was a judgment debt.

(*a*) 12 C. B. 801.

(*b*) 26 Law Jour., Exch., 54.

H. T. 1859.
Eschequer.
BOYSE
.v.
SIMPSON.

H. T. 1859. On none of those grounds, therefore, should I be prepared to determine that a dividend in bankruptcy could not be attached under the Common Law Procedure Act 1856. But a consideration of the 293rd section of the late Bankrupt Act, 20 & 21 Vic., c. 60, in connection with the 66th section of the Common Law Procedure Act, appears to me to suggest conclusive reasons against attaching such a dividend under the garnishee clauses of the latter statute. According to that 66th section, if the garnishee disputes his liability, "The Court or a Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment creditor, if less than the judgment debt, and for costs of suit."

This proceeding is in form, in substance and in effect, an action against the garnishee; it is commenced by writ. The proceeding upon it is in terms called "a suit;" the proceedings upon it are to be the same, or as nearly as may be, as on a writ of revivor under the Common Law Procedure Act 1853. According to the 151st section of that statute, the pleadings and proceedings on a writ of revivor shall be the same as in an ordinary action, so far as the same may be applicable; and execution is to follow, if the plaintiff in the garnishee writ succeeds. It is impossible to hold that this is not an "action" against the garnishee; and if it be, it is prohibited by the 293rd section of the Bankrupt Act. The result of that (if the garnishee clauses of the Common Law Procedure Act were held applicable to a dividend in bankruptcy) would be, that they would be applied to a kind of demand to which the Legislature prohibits the application of one part of their machinery—and that a most important part of it; for it is the only portion of it which provides the means of reviewing, in an Appellate Court, the decision of the Court by which the garnishee order is made. We ought not, in my opinion, by our construction of those garnishee clauses, to give to them a force which would lead to a result so plainly inconsistent with the intention of the Legislature; and we ought, I think, to treat the 66th section of the statute as a legislative exposition of

the 63rd, and to hold that no debts are contemplated as liable to be attached under the 63rd section, as to which, instead of a summary order to pay, from which there can be no appeal, the Court is not empowered under the 66th section, if the garnishee disputes his liability, to direct that liability to be tried, by awarding such writ as the 66th section prescribes; that is, to direct a proceeding by means of which the liability may be determined, not by a summary order on motion, without the intervention of a jury or a power of appeal, but in an action commenced by the writ which the statute prescribes, and by means of which the judgment of the Court may be reviewed by the ordinary appellate tribunals.

H. T. 1859.
Exchequer.
BOYSE
v.
SIMPSON.

Our attention has been called to the Rules framed by the Court of Bankruptcy under their Act of Parliament, particularly the 98th and 100th General Orders of that Court. Those Orders create very great difficulty in the way of applying the garnishee sections to dividends in bankruptcy. They appear to me to furnish strong reasons for saying that the assignee, in holding the dividend for the creditor in whose favour it is declared, is clothed with such responsibilities in respect of it, that even if it were, for other reasons, and in other respects, a debt capable of being attached, he ought not to be ordered by a Court of Law to pay it to the garnishee creditor. The 100th Order in Bankruptcy directs that, in the case of creditors entitled to dividends, and holding securities for their debts, their securities shall be produced to the assignee, and certain matters prescribed by that Order shall be done, with reference to such securities, before the creditor holding them shall be paid. The Irish Common Law Procedure Act 1856 contains no provision analogous to the 60th section of the English statute, 17 & 18 Vic., c. 125, enabling the Court or Judge to enforce, at the instance of the garnishee creditor, discovery and production of documents relating to debts owing to the debtor; and, even if it did, that provision does not (at least it does not in terms) confer on the Court of Law the power of directing such documents to be handed to the creditor, or to be produced elsewhere. It would be impossible for a Court of Law, without plainly usurping jurisdiction, in the case of a dividend declared in favour of a creditor

H. T. 1859. holding securities, to order payment of the dividend by the assignee
Exchequer. —which must be a payment absolutely—in contravention of the
BOYSE Orders of the Court of Bankruptcy, requiring him *not* to pay unless
v. the matters prescribed by the 100th Order shall have been executed
SIMPSON. and complied with. From all this it seems to me to follow that, as
to such debts, an order to pay ought not to be made; or if a conditional
order to pay be obtained, on its appearing to the Court that the
creditor holds securities for his debt, such conditional order ought to
be discharged. Even if, therefore, the 293rd section of the Bankruptcy
Act had not been passed, I should be of opinion that, under the
other sections of that statute, and the 100th General Order of the
Court of Bankruptcy, such a dividend (that is, a dividend declared
in favour of a creditor having securities for his debt) is held by the
assignee under such special trusts and conditions as exempt it from
the operation of the garnishee clauses of the Common Law Procedure
Act.

Again, the 98th Order directs that the dividend shall be paid
(not in money, but) by a cheque drawn by the assignee, and payable
to the creditor in whose favour the dividend has been declared.
According to that Order, the assignee is not entitled to make this
cheque payable to any other person; and an order of this Court
on the assignee to pay any part of the dividend to the garnishee
creditor would, so far, be in contravention of the 98th Order in
Bankruptcy. In *Ex parte Richards* (a), it would seem to have
been the opinion of the Court of Bankruptcy (though the point was
not decided), that the assignee of a debt due to a creditor of a
bankrupt could not sustain an application to that Court for pay-
ment of the dividend awarded to the creditor. The objection to
attaching a dividend on this ground is certainly a formal one; and
I have no doubt that if a Court of Law should determine the divi-
dend to be liable to attachment, and should pronounce an order to
attach it, the Court of Bankruptcy, with the desire which every
Court has to forward the proceedings of other Courts in administer-
ing justice in favour of creditors, would, either by a special order, if

applied to, or by a modification of the 98th General Order, give effect to the garnishee creditors' rights under the Act of Parliament. But should they not think fit to do so, we should have no power to supersede their authority, by ordering their officer to disobey their Rule, even in a matter of strictly formal regulation. In the administration of the funds at their disposal, they may consider particular forms essential for the security of the funds, or for maintaining the responsibility of their officers, by written records, or other evidence of their acts; and of this they, and not we, are the proper judges.

H. T. 1859.
Exchequer.
BOYSE
v.
SIMPSON.

On the whole, I am of opinion, not only that the cause shown against the conditional order on the assignee to pay the plaintiff ought to be allowed, but the attaching order ought to be set aside, the dividend not being, in my judgment, a debt contemplated by the 63rd section of the Common Law Procedure Act 1856.

The question, however, is an important one. The claim of the garnishee creditor is for a substantial sum. Our order discharging the attachment would be final; and, therefore, if he be advised that the case is one in which it is worth his while to seek the opinion of an Appellate Court, I think we ought not to withhold from him the means of so doing. In that case, and for that purpose, therefore, we are disposed to allow a writ to issue under the 66th section, and to let this motion stand until the proceedings under that writ shall be brought to a close. Those proceedings may be so adjusted as not to involve any considerable costs, and may be prosecuted with very little loss of time. Upon the issuing of the writ, a special case may be stated, in a very brief form, under the 92nd section of the Common Law Procedure Act 1853: judgment may, if the parties desire it, be pronounced by us on such special case, without the expense or delay of another argument, in conformity with the opinion which we now express, and the case may be at once taken, under the 94th section, to a Court of Error; or the point may be conveniently raised, as was done in *Johnson v. Diamond* (a), by the plaintiff stating all the facts in the writ, and by a demurrer to the writ on the part of the defendant.

(a) 11 Exch. 73.

H. T. 1859. GREENE, B.

Exchequer.

BOYCE

v.

SIMPSON.

I am very clearly of opinion that the dividend payable to the creditor under the bankruptcy is not attachable under the 63rd section; and I think the reasoning of my Lord CHIEF BARON is quite conclusive upon that subject. The only doubt I have is, whether we should sanction the issuing of a writ now; but as that proceeding will not involve much expense, and as judgment may be delivered immediately, so as to allow the creditor to take the opinion of the Appellate Court, I do not dissent from that part of the order.

At the same time, I am quite clearly of opinion that the result of such a proceeding will be a decision that the attachment order cannot be maintained.

A P P E N D I X.

H. T. 1858.
Queen's Bench
Feb. 1.

LEATHLY v. CAREY.*

EJECTMENT for non-payment of rent. Defence:—Payment before action brought, the particulars of which were indorsed as follows:— “December 1st 1857. By cash this day paid to plaintiff, on account of rent in plaint claimed, £216.” It appeared by the affidavits of the plaintiff and his agent that the rent had not been paid; that the defence was false, and filed for the purpose of delay; that the premises sought to be recovered were in decay, and that the defendant frequently promised payment of the rent.

W. J. Sidney, for the plaintiff, moved that this defence might be set aside, as being false, and a sham pleading, and that the plaintiff might be at liberty to mark judgment, as in the case of no plea filed. He cited *Richley v. Proone* (*a*); *Miley v. Walls* (*b*); *Shadwell v. Berthoud* (*c*); *Body v. Johnson* (*d*).

If a plea appears by affidavit to be palpably false, it is within the spirit of the Common Law Procedure Act 1853, s. 83, and the Court will grant a conditional order to set it aside, with liberty to mark judgment.

F. Smith, contra.

The Court cannot try the truth of the defence upon affidavit, or call upon a suitor to verify his plea upon oath. He cited *Smith v. Blackwell* (*e*); *Merrington v. Beckett* (*f*), and Common Law Procedure Act 1853, s. 83.

CRAMPTON, J.

If a plea, upon the face of it, shows that it is manifestly a sham plea, the Court has always, even before the passing of the Common Law Procedure Act, possessed jurisdiction to set it aside; but if the Court sees that anything upon the plea may be the subject-matter of trial, it will not interrupt the proceedings by a summary order. I apprehend that if a plea be palpably false, it may be considered as a sham plea, and within the spirit, although not within the very terms, of the Common Law Procedure Act, s. 83; and this plea is manifestly intended to create embarrassment and delay. We do not intend to overrule the doctrine that the defendant is not required

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| (<i>a</i>) 1 B. & C. 286. | (<i>b</i>) 1 Dow. P. C. 648. |
| (<i>c</i>) 5 B. & Ald. 750. | (<i>d</i>) 5 B. & Ald. 751 n. |
| (<i>e</i>) 1 Moo. & P. 338. | (<i>f</i>) 3 D. & R. 231. |

* *Coram CRAMPTON and O'BRIEN, JJ.*

H. T. 1858.
Queen's Bench

LEATHLY
v.
CAREY.

to verify the plea by affidavit, it not being a plea in abatement; but we shall follow a course which appears to be a safe one, and not without precedent: we shall grant a conditional order, to set aside this defence, with liberty to the plaintiff to mark judgment, and we shall give the defendant time to show cause, but it must be upon the payment of costs.

Subsequently, by consent, an order was made—Defence to be set aside, and possession of the premises to be given up in one month.

E. T. 1858.
April 29.

DUNNE v. GUMLEY.*

A defendant cannot demur and rejoin under ss. 48 or 59 of the Common Law Procedure Act 1853.

THIS was an action by the plaintiff, an attorney, to recover the amount of a bill of costs. The defendant pleaded an agreement between him and the plaintiff, that the latter should not seek to recover the amount of his costs, until a fund, to arise from the sale of certain lands about to be sold in Chancery, should be realised. The plaintiff sought to reply that, before the agreement could be carried out, the defendant had dismissed the plaintiff as his attorney.

J. E. Walsh applied, under the Common Law Procedure Act 1853, s. 48, for liberty to demur to this replication, and also to rejoin that the dismissal of the plaintiff as the defendant's attorney was occasioned by the plaintiff's own misconduct.

O'BRIEN, J.

I should rather say your application would be under section 59. It appears to me, however, that that section will not help you, being limited to the pleadings specifically mentioned in it, and not extending to the pleadings in any stage. You must elect, therefore, either to demur or rejoin singly.

The following order was made:—

Let this motion stand over, and, in the interim, let the defendant be at liberty to amend his defence as he may be advised, and let him furnish to the plaintiff a copy of such amended defence.

* *Coram O'BRIEN, J.*

T. T. 1858.
Queen's Bench

CARPENTER v. MURTAGH.*

June 2.

MUSGRAVE applied for a conditional order for an attachment against James Carpenter, for assaulting Patrick Murtagh, a process-server, in the execution of his duty in effecting service of a writ of summons and plaint.

It appeared, by the affidavit of Murtagh, that Carpenter was acquainted with the deponent, and that, upon his presenting the copy writ to Carpenter, who was sitting on a jaunting-car, he refused to receive the same, whereupon the deponent left the said copy writ upon the seat of the car, by the side of Carpenter, who then struck the deponent a violent blow on the head with his whip.

Counsel cited *Peyton v. M'Namara* (a).

Motion granted.

(a) 1 Law Rec., O. S., 181.

* *Coram O'BRIEN, J.*

COLLES v. CONEYS.*

June 2.

ACTION on a bill of exchange by indorsee against acceptor. Plea, that the said bill of exchange was accepted by the defendant without any consideration whatever passing from any one for said acceptance to the defendant, but as a voluntary gratuity from him to one M. D. That shortly after the making of said bill, and before same was indorsed to the plaintiff, and whilst same was still current, the maker thereof, on behalf of the said M. D., in consideration that defendant would pay the said bill, promised the defendant not to sue him thereon until the defendant should be out of his difficulties with his nephew W. C. That by such stipulations it was thereby meant and intended by the said parties that the defendant should not be sued on the said bill so long as certain disputes and litigation should be pending between the defendant and said W. C. Averment, that such disputes and litigation remained undecided, within the meaning of such stipulation; and that the said plaintiff, at the time of the indorsement of said bill, took the same with full notice of and subject to such stipulation.

To an action on a bill of exchange, by indorsee against acceptor, a defense of want of consideration, and an agreement not to sue the defendant during the pendency of certain disputes between him and his nephew, set aside as embarrassing.

* *Coram CRAMPTON, J.*

T. T. 1858.
Queen's Bench

COLLES
 v.
 COKEYS.

H. Fitzgibbon applied to set aside this defence, as embarrassing, double, uncertain and ambiguous. It is not sufficient to plead a want of consideration merely, there must be a distinct allegation that there was no other consideration than that mentioned: *Boden v. Wright* (*a*); and Parke B., in *Mills v. Oddey* (*b*). The facts from which the want of consideration appears must be set forth in the defence: *Faris v. Ross* (*c*). Further, this plea amounts to the suspension of the right of action until a particular time, which cannot be pleaded, as the right of action, if once suspended, is gone for ever. It is also bad in endeavouring to vary a negotiable security entered into with a person no party to it. This plea would have been bad on general demurrer: *Webb v. Salmon* (*d*); *Ford v. Beech* (*e*); *Dean v. Jefferies* (*f*).

Beytagh, in support of the plea.

This is a perfectly good and honest plea. An agreement for consideration not to sue for a limited time may be made during the currency of a bill: *Pike v. Street* (*g*). The plaintiff took this bill with notice of the agreement, and subject to the stipulation set out in the plea.

CRAMPTON, J.

I must set aside this defence.

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| (<i>a</i>) 12 C. B. 445. | (<i>b</i>) 8 Ir. Jur. 109. |
| (<i>c</i>) 1 Ir. Jur., N. S., 109. | (<i>d</i>) 19 Law Jour., Q. B., 34. |
| (<i>e</i>) 11 Q. B. 852; S. C., 12 Jur. 310; 17 L. J., Q. B. 114. | |
| (<i>f</i>) Cro. El. 852. | (<i>g</i>) M. & Mal. 226. |

June 9.

HALL v. RYND.*

Liberty to mark judgment without affidavit of service granted, the defendant not having appeared pursuant to his undertaking, to accept service of the summons and plaint, and appear to the action.

Purcell now moved for liberty to mark judgment without the usual affidavit of service. Notice of the present application has been served upon the defendant. There is no appearance on the other side.

Motion granted.

* Coram CRAMPTON and O'BRIEN, JJ.

T. T. 1858.
Queen's Bench

PERCIVAL v. DUNNE.*

June 9.

J. PROCTOR moved that execution be stayed upon the judgment in this action, until the decision of the Court of Exchequer Chamber should be had upon the allegation of error by the defendant, without bail given by the defendant, under the Common Law Procedure Act, 1853, s. 172; the defendant undertaking to prosecute the proceedings in error with effect and without delay; or for such other order, &c.

Upon the argument of the demurrer, taken in this case by the defendant to the plaintiff's replication, the Court being equally divided in opinion, CRAMPTON, J., *pro forma*, withdrew his judgment, whereupon the demurrer was overruled, and judgment given thereon for the plaintiff.

Dames, on the other side, submitted that the matter was in the discretion of the Court.

Motion granted.

the Common Law Procedure Act (*Ir.*) 1853, s. 172.

* *Coram CRAMPTON and O'BRIEN, JJ.*

FLETCHER v. EGAN.*

June 10.

VANCE applied for a charging order, under s. 135 of the Common Law Procedure Act 1853, to attach a fund, the produce of a sale of certain lands in the Incumbered Estates Court. Execution has not been actually issued, but as our judgment was obtained in 1854, and there has been no change in the parties since, we are in a position to issue execution.

O'BRIEN, J.

I am informed by the officer of the Court, that the Court of Common Pleas has decided that execution must actually be issued before a charging order can be made. There does not appear to me to be

tion to do so, yet it considers it more prudent that execution should have actually been issued at the time of making the application.

* *Coram O'BRIEN, J.*

T. T. 1858.
Queen's Bench
FLETCHER
v.
EGAN.

any provision in the Act of Parliament, making such a course imperative upon the party making the application, but that it is sufficient if such party be in a condition to issue execution. The party for whom you apply in this case is in this condition, his judgment being one of 1854, and no change of parties since then. Perhaps, however, you will consider it more prudent to follow the practice of the Common Pleas, and issue an execution, upon production of which to the officer, the charging order will be made.

Order accordingly.



DOUGLAS v. MOORE.*

June 10.

The name of a defendant, unnecessarily made a party to an action of ejectment on the title, struck out, he being dead at the time of service of such ejectment.

VANCE applied for liberty to strike out the name of one of the defendants to an action of ejectment upon the title, he having been unnecessarily made a party. The ejectment is brought upon the expiration of an old freehold lease, and the defendant, whose name is sought to be struck out, was the heir-at-law of the original lessee. At the time of the service of the ejectment, the defendant in question was dead, but the process-server swears that he effected service upon him by serving his wife. This is a case not provided for by the Act of Parliament.

Motion granted.

* *Coram O'BRIEN, J.*



DUNNE v. GUMLEY.*

June 11.

The Court will not permit Senior Counsel to settle issues without a Junior.

John E. Walsh, Q.C., and Charles Rolleston, Q.C., having appeared to settle issues—
 Vance, on behalf of the Junior Bar, objected to Senior Counsel settling issues without a Junior.

CRAMPTON, J.

I cannot allow Senior Counsel to settle issues alone.

* *Coram CRAMPTON, J.*

T. T. 1858.
Consol. Cham.

Consolidated Chamber.*

ALLAIN v. CHAMBERS.†

June 25.

THIS was an application to compel the plaintiff to give security for costs. The affidavit upon which the application was made stated, that the plaintiff was the master of a French ship, and that the action was brought to recover the freight of a cargo of Indian corn, brought by the said vessel from Galatz to Tralee for the defendant. That although the plaintiff in the summons and plaint was described as "master of the ship *Notre Dame de Lotivi*, now lying in the Basin of the Tralee ship canal," he was in fact a native of Bayonne in the empire of France, where he resided when not at sea; that he had never been in an Irish port before, and was likely to leave this country in a short time; that he had no property of any kind within the jurisdiction, and that unless this application was granted, the defendant, if successful in the action, would have no means of obtaining his costs; the defendant also swore to merits.

The Court will not require security for costs to be given by a plaintiff, who is a foreigner, and usually resident abroad, if, at the time, he is actually in this country. The fact of the plaintiff having a foreign domicile is immaterial.

The affidavit of the plaintiff, in answer, stated that he had now been for four weeks residing within the jurisdiction, on board his said ship, in the said ship canal; that he had been advised that he would be a necessary witness in the action, which he fully intended to bring to trial, and was also determined to tender himself for examination, and that he was unable to give security for costs, in consequence of the loss he had sustained by reason of the refusal of the defendant to pay him the amount claimed in this action.

Leaky, in support of the application, contended that the plaintiff's affidavit was insufficient, because it did not, as it should have done, negative his having a domicile abroad, in addition to stating that he was now in this country; he cited *O'Neill v. O'Neill* (a); *Drummond v. Tillinghast* (b). He further contended that the plaintiff should have sworn to his intention to remain in this country until judgment had been obtained in the action, while his affidavit merely indicated an intention to remain until verdict, or rather until trial.

- (a) 6 Law Rec., N. S., 159.
(b) 16 Q. B. 740; S. C., 15 Jur. 384.

T. T. 1858.

Consol. Cham.

ALLAIN

v.

CHAMBERS.

J. C. Neligan, contra.

This application must be refused ; the cases cited do not warrant the deduction drawn, that a plaintiff must negative his having a domicile abroad. The fact of the plaintiff being actually resident here at present is the true criterion by which this question is to be settled : *Ciragno v. Hassan* (*a*). In England, it has been laid down as a general rule, that security for costs is never exacted where the plaintiff is about to go abroad ; but that it is necessary that he should have actually left this country. That rule was afterwards acted upon in an *Anonymous case* (*b*). The Court of Exchequer in England followed the rule laid down by these cases, in *Dowling v. Harman* (*c*), and again, in a very recent case, *Tambisco v. Pacifico* (*d*), where it was in fact admitted upon the affidavits that the plaintiff had a domicile at Athens, and was in this country merely for the purpose of bringing his action. The plaintiff need not have sworn that he intended to remain in this country until judgment ; such a statement would be of very little avail, for he might change his intention at any time before judgment. See judgment of Alderson, B., in *Tambisco v. Pacifico* (*e*).

He also cited *Willis v. Garbutt* (*f*).

PENNEFATHER, B.

I cannot, on such a motion as this, go into those nice distinctions of what a plaintiff intends to do. I think the cases cited in opposition to this application establish the rule to be observed. I must refuse the motion.

(*a*) 6 Taunt. 20.

(*b*) 8 Taunt. 737.

(*c*) 6 M. & W. 131.

(*d*) 7 Exch. 816; S. C., 21 L. J., Exch., 276.

(*e*) p. 819.

(*f*) 1 Y. & J. 511.

BOLTON, *Appellant* ;
 THE GUARDIANS of the MALLOW UNION, *Respondents*.*

CIVIL-BILL by the appellant, for work and labour, and for eighteen months' salary as Inspector and Registrar of Common Lodging-houses, pursuant to the statutes, &c.—Dismiss by the Assistant-Barrister,† and appeal therefrom.

E. Sullivan (with him *Jellett*), for the appellant, was proceeding to argue that the statutes 14 & 15 Vic., c. 28, and the 16 & 17 Vic., c. 41, pursuant to which the appellant had been appointed, extended to Ireland.

R. Longfield (with him *Exham* and *W. M. Johnson*) objected that an action of debt did not lie against the respondents, and that, as the appellant claimed to be paid out of the poor-rate, his remedy, if any, was by mandamus, and not by civil-bill. He cited *Bogg v. Pearse* (a); *Addison v. The Mayor of Preston* (b).

O'BRIEN, J.

I must act upon the authority of the cases which have been cited, and leave the appellant to his remedy by mandamus.

Dismiss affirmed..

- (a) 10 C. B. 534; S. C., 20 Law Jour., C. P., 99.
 (b) 12 C. B. 108; S. C., 16 Jur. 643; 21 Law Jour., C. P., 146.

* *Coram O'BRIEN, J. (Cork Summer Assizes 1858). † BERWICK, Serjeant.*

1858.
Circuit Case.
 July 26.

An action of debt, for arrears of salary, to be paid out of poor-rate, does not lie against the Guardians of a Poor-law Union.

The proper remedy is by mandamus.

REGINA v. ROACH and wife.*

M. T. 1858.
Queen's Bench
 Nov. 2.

G. O. MALLEY moved that the prisoners, who were in gaol upon a charge of manslaughter, might be discharged upon giving bail. Notice of the motion had been served on the Crown; but no affidavit of such service had been made, nor was there any appearance on the part of the Crown, who, it was stated, did not intend to oppose the application.

In bail motions, there must either be an affidavit of service of notice on, or an appearance on the part of the Crown.

LEFROY, C. J.

In such motions as the present, there must either be an affidavit of the service of the notice, or some one must appear on the part of the Crown.

* *Coram LEFROY, C. J. and PERRIN, J.*

M. T. 1858.
Queen's Bench

Nov. 3.

M'ALISTER v. CALLAN.*

Where, by a fatality, the Judge omits, at the trial, to certify, in order to entitle the plaintiff to costs, as required by the Common Law Procedure Amendment Act 1856, sec. 97, the Court will supply the omission.

T. O'HAGAN (with him *A. Hamill*), for the plaintiff, applied for a certificate for costs, under section 97 of the Common Law Procedure Amendment Act (Ireland) 1856, although the verdict was only for £5. The action, which was one for injury to a party wall, having come on for trial at the Summer Assizes 1857, at Dundalk, and a view jury having been empanelled, upon the suggestion of the Court, the case was referred to six of the view jurors. Before, however, any verdict was given, the Judge and the Counsel for both parties had proceeded to the next Assize town. A verdict was subsequently found for the plaintiff for £5. The officer refused to tax the costs, because the verdict did not exceed £5. Both parties resided within the same civil-bill jurisdiction; but a question of title being involved in the case, the Assistant-Barrister had no jurisdiction to entertain it. It thus became necessary to try the case at the Assizes; and as the omission to obtain the Judge's certificate, as required by section 97, was the result of a mere fatality, over which the parties had no control, the present application was made to the Court to supply that omission.

S. Ferguson, contra.

The following order was made by the Court:—

Let the plaintiff have costs in said action, as between party and party, notwithstanding the finding of the jury was only for £5, and notwithstanding the 143rd section of the Common Law Procedure Act 1853, and the 97th section of the 19 & 20 Vic., c. 113, the defendant not to lodge any memorandum of error; and let each party abide his own costs of this motion.

* Before the Full Court.

NOTE.—Where the Judge who tries the case exercises his discretion in refusing to certify for costs, the Court will not review such exercise of discretion, unless it be satisfied that the Judge has acted upon an erroneous view of the facts or law of the case: *Dunston v. Paterson* (4 Jur., N. S., 1024).

M. T. 1858.
Queen's Bench
Nov. 6.

MACNAMARA v. LYNCH.*

G. O. MALLEY moved, under section 162 of the Common Law Procedure Act (Ireland) 1853, that the assignees of the plaintiff, who had become an insolvent since the bringing of the action, should elect either to discontinue, or to continue the proceedings and give security for costs, and that in the interim the proceedings be stayed.

O'BRIEN, J., made the following rule:—

Let security for costs be given within six days after the service of this order upon the assignees and plaintiff's attorney; and let proceedings be stayed in the interim, pursuant to the 162nd section of the Common Law Procedure Act 1853.†

Assignees of an insolvent ordered to elect, either to discontinue the action commenced before the insolvency, or to continue it, pursuant to the Common Law Procedure Act 1853, section 162.

* *Coram O'BRIEN, J.*

† NOTE.—A similar order was made in the case of *Tierney v. Thomas*, Queen's Bench, Michaelmas Term 1857, as follows:—

Carr, for the defendant, moved that further proceedings upon the writ of revivor issued in this cause be stayed until security for costs be given, inasmuch as after the obtaining the judgment therein mentioned, and before the issuing of the writ of revivor, the plaintiff therein mentioned had become bankrupt. It appeared by affidavit that both the official and trade assignees had been duly appointed.

Per Curiam.

Let security for costs be given in this case within six days after service of this order upon the plaintiff's attorney and upon the said assignees, pursuant to section 162 of the Common Law Procedure Act 1853, and let the proceedings upon the writ of revivor be stayed in the interim.

HUTTON v. NOLAN.*

Nov. 11, 12,
13.

BAGOT applied for an order to substitute service of a writ of summons and plaint in ejectment for non-payment of rent, under the Common Law Procedure Act 1853, section 34, upon the ground that the defendant was out of the jurisdiction, and that it was doubtful whether the premises in question could be treated as a vacant posses-

Leave granted to substitute service of an ejectment for non-payment of rent, under the Common Law Procedure Act

1853, s. 34, by serving the undertenants in possession of the premises, the former attorney for the defendant, the superintendent of the defendant's studies as a student of divinity, and by posting a letter addressed to the defendant at his last known place of residence.

* *Coram PERRIN, J.*

M. T. 1858. Queen's Bench sion, under section 197 of the same Act, the undertenants of the defendant being in occupation of them.

HUTTON
v.
NOLAN.

It appeared by affidavit that the defendant Nolan had left the country more than a year since; that the undertenants who were in occupation of the premises had not paid rent, nor had it been demanded from them, on Nolan's part, for a year past; and that, in fact, owing to the depreciation of the property, the head rent, which was vested in the plaintiff, exceeded the rent payable to Nolan, who had, therefore, no interest. It also appeared by the affidavit, that upon inquiry having been made at the Chapel-house, in Gardiner-street, Dublin (the defendant's last known place of residence in Ireland), the Rev. J. Lynch, one of the clergymen resident there, stated that Nolan was a student of divinity in the Roman Catholic Church, and was pursuing his studies in different places on the Continent, and referred the plaintiff to Joseph O'Meagher, who had been Nolan's attorney. On inquiry at O'Meagher's, a letter was produced from Nolan, dated more than a year since, discontinuing him as his solicitor. It also appeared that the plaintiff was informed at O'Meagher's that Nolan now had no property in Ireland.

PERRIN, J.

Nov. 13.

Service of this ejectment may be substituted, by serving copies of the ejectment and of this order upon the tenants in possession of the premises mentioned in the writ, and upon Joseph O'Meagher, formerly the attorney for the defendant, and upon the Rev. John Lynch, and also by sending a letter, containing similar copies, through the post, and addressed to the defendant, wherever he may be ascertained to be now, or to have last resided.

Nov. 15.

ASSIGNEES OF MURPHY v. CUFFE.*

To a count by the assignees of a bankrupt. The summons and plaint contained four counts; first, for money had and received to the use of the bankrupt before his bankruptcy; secondly, for money had and received to the use of the plaintiffs as assignees of the bankrupt; thirdly, for the conversion of certain bank-notes, the property of the bankrupt before his bankruptcy; fourthly, for the conversion of certain bank-notes, the property of the plaintiffs, as assignees of the bankrupt.

Irish Bankrupt and Insolvent Act 1857, allowed; but a plea of set-off, under s. 251, refused.

* *Coram Crampton, J.*

J. Kernan applied for liberty to plead to the second count, first, a traverse; secondly, payment to the defendant by the bankrupt, without notice of the act of bankruptcy before the filing of the petition in bankruptcy, under section 328 of the Irish Bankrupt and Insolvent Act 1857. To the third count; first, a traverse of the conversion; secondly, delivery of the bank-notes to the defendant, without notice of the act of bankruptcy before the filing of the petition in bankruptcy, and that the retention of the bank-notes is the conversion complained of. To the fourth count, the same pleas as to the third count. He also applied for liberty to plead a set-off, under section 251 of the Bankrupt Act.

M. T. 1858.
Queen's Bench
MURPHY
v.
CUFFE.

CRAMPTON, J.

You may take the two pleas you wish to plead to the second, third and fourth counts of the summons and plaint; but I cannot allow you the plea of set-off, because section 251 of the Bankrupt Act only applies to the administration of the bankrupt's property by the Bankrupt Court, and not to a Common Law right to be established in a Court of Law.

HARRIS v. NIPE.

Nov. 8, 9, 17.

A. Lane applied for an order to substitute service of a writ of revivor, under the Common Law Procedure Act 1853, s. 34, upon the ground that it had been found impossible to effect service upon one of the defendants.

It appeared by the affidavit, that the judgment, which it was sought to revive, had been recovered against Thomas Nipe, John Nipe and Archibald Nipe, in the Court of Queen's Bench, in Trinity Term 1851, by Robert Harris, since deceased. That John Nipe and Archibald Nipe had been duly served; but that Thomas Nipe, the defendant who had not been served, had emigrated to America more than seven years since, and was believed to be still in America.

It also appeared that Thomas Nipe had formerly possessed a farm in Antrim, which, upon the occasion of his emigrating, he had made over to his brother John Nipe; but it did not appear that Thomas

Leave granted to substitute service, under the Common Law Procedure Act 1853, s. 34, of a writ of revivor of a judgment obtained against three conusors, two of whom had been duly served, it being found practically impossible to serve the third conusor, whose residence was not known, he having emi-

grated to America shortly after the recovery of the judgment.

M. T. 1858. Nipe now had any property, or agent, or representative in Ireland,
Queen's Bench or that he had removed to avoid service.

HARRIS

v.
NIPE.

PERRIN, J.,* referred to *Kitchin v. Wilson (a)*, and refused to grant the application.

Nov. 17.

A. Lane now renewed the motion.

CRAMPTON, J.,† made the following order:—

Let the service of the writ of revivor in this cause upon the defendant Thomas Nipe be substituted, by delivering a true copy thereof, together with a true copy of this order, for said Thomas Nipe, unto, and by leaving same with, his co-defendant John Nipe.

(a) 4 Jur., N. S., 539; S. C., 27 Law Jour., C. P., 253.

* *Sobus.*

† *Sobus.*

REYNOLDS and MATHEWS v. BLOOMFIELD.*

Nov. 4.

Upon a motion for an attachment against the plaintiffs in this action, who were out of the jurisdiction, for contempt of Court in not answering the defendant's interrogatories pursuant to an order of the Court, upon the ground that the answers were evasive and insufficient; and also that the plaintiffs should be stayed from proceeding with their action until they had fully answered the several interrogatories which had been exhibited to them. This was an action upon a bill of exchange for £150, drawn by John C. Bloomfield upon and accepted by the defendant, and indorsed to De Moors & Co., and by them indorsed to the plaintiffs for value, and before it had arrived at maturity. The defendant, without traversing these facts, amongst other defences, pleaded that

Where a party is interrogated as to his knowledge, information, and belief, an answer as to knowledge and information, but not as to belief, is not sufficient.

A general answer to a particular interrogatory is not sufficient.

Upon such a motion, it is not open to the party against whom the attachment is sought to fall back upon the immateriality of the interrogatories, unless it appears upon the face of them that they have been framed for the purpose of delay, and are not connected with the subject-matter of the action.

The proper course, if interrogatories are immaterial or otherwise objectionable, is to move to strike them out.

* Before the Full Court.

the acceptance was an accommodation acceptance, of which De Moors and Co. had notice; that De Moors & Co. held the bill until it became due, when the amount thereof was paid to them by the drawer; and that, after maturity and payment, it was indorsed by De Moors & Co. to the plaintiffs.

M. T. 1858.
Queen's Bench
REYNOLDS
v.
BLOOM-
FIELD.

By leave of Pennefather, B. (obtained without notice to the plaintiffs), the defendant, with a copy of the defence, delivered to the plaintiffs ten interrogatories, pursuant to the Common Law Procedure Amendment Act 1856, s. 56, of which the 7th & 8th were as follows:

Seventh interrogatory.—“Was not a receipt of the wife of the said John C. Bloomfield for a sum of £200, or any and what sum, as “for or on account of an annuity, forwarded to and received by you, “or either and which of you, by or from the said De Moors & Co., “or by or from any other and what person, at any, and, if so, what “period between the 24th of July 1853 and the 4th of November “1853, or at any other and what time, and whether or not for col- “lection or how otherwise? was not the amount specified in such “receipt, or any and what part thereof, paid to you at any time, and “when, by whom and how, and whether or not by any and what “remittance, and how made by or from the Branch Bank at Ennis- “killen of the Ulster Banking Company, or any and what Banking “Company, or person or persons?—Declare the truth as to the mat- “ters inquired after by this interrogatory, to the best of your respec- “tive knowledge, hearsay, information, and belief.”

Eighth interrogatory.—“Was not the said receipt given to or “deposited with the said De Moors & Co. upon the occasion of the “passing of the said bill to said firm, and whether or not, to provide “for the payment thereof, and did not the defendant accept said bill “on the terms and condition that such receipt for said sum of £200, “being a half-year's annuity payable to the wife of the said John “C. Bloomfield, should be so deposited with the said De Moors and “Co., in order to meet and provide a fund for payment of said bill, “or how otherwise?—Declare the truth, as to the matters inquired “after by this interrogatory, to the best of your respective know- “ledge, hearsay, information, and belief.”

These interrogatories were answered as follows by one of the plaintiffs:—“This deponent, James Mathews, in answer to the “seventh interrogatory, saith, that the sum of £199. 11s. 0d. was “paid to deponent and his said partner, on or about the 3rd day of “November 1853, by a remittance of the Ulster Banking Company “through their branch office at Enniskillen; but this deponent can- “not say whether, but believes the same was made for or on account “of an annuity payable to the wife of the said John C. Bloomfield;

M. T. 1858. "and deponent saith that, to the best of his remembrance, information, and belief, a receipt of the wife of said John C. Bloomfield for £200, on account of the said annuity, was not forwarded to and received by deponent and his said partner by and from the said John C. Bloomfield, between the 24th of July 1853 and the 4th of November 1853."

"This deponent, James Mathews, saith, in answer to the eighth interrogatory, he does not know whether, nor does he believe that, said receipt was given or deposited to or with the said De Moors & Co., upon the occasion of passing the said bill to the said firm, or whether or not to provide for payment thereof; and deponent does not know whether the defendant accepted the said bill on the terms and conditions that such receipt for said sum of £200, being half a year's annuity payable to the wife of the said John C. Bloomfield, should be so deposited with the said De Moors & Co., in order to meet and provide a fund for payment of said bill, or how otherwise."

The other plaintiff (Reynolds) made no specific answer to eight of the ten interrogatories, but answered generally that he "withdrew in the month of July 1853 from taking, and hath not since taken, any active part in the said firm of, &c.; and he is, therefore, unable to make answers to any of the matters contained in, referred to or inquired after" in eight of the interrogatories, comprising the seventh and eighth.

July 19. *W. Smith* now moved; but, upon the application of Counsel for the plaintiffs, the motion was directed to stand until the first day of Michaelmas Term.

Nov. 4. *W. Smith* now moved on behalf of the defendant. These answers are wholly insufficient and evasive. The interrogatories require the plaintiffs to answer as to knowledge, hearsay, information, and belief; and Mathews has not answered the eighth interrogatory as to belief. Further, being interrogated as to the obtaining of the receipt for the annuity from De Moors & Co., he answers that, according to his remembrance, it was not received from John C. Bloomfield, which is palpably evasive. Further, when an interrogatory contains both general and particular inquiries, the particular inquiries must be particularly answered; the general answer, therefore, of the defendant Reynolds is also insufficient and evasive: *The Duke of Brunswick v. The Duke of Cambridge* (a); *Neate v. The Duke of Marlborough* (b); *Amhurst v. King* (c); 1 *Dan. Chan. Prac.*, 2nd ed.

(a) 12 Beav. 281.

(b) 2 Y. & C. Ex., 3.

(c) 2 S. & S. 183.

pp. 689, 691, 692. An attachment cannot reach the parties; but the Court can stay the action until sufficient answers are put in. M. T. 1858.
Queen's Bench

REYNOLDS

v.

BLOOM-
FIELD.

G. Fitzgibbon and P. White, contra.

This power to file interrogatories, which is given by the Common Law Procedure Act, if not carefully exercised by the Courts, may be abused by parties who want, not discovery, but delay. Mathews is the only plaintiff who knows anything concerning the matters comprised in the interrogatories, and he answers particularly. The defence does not traverse the averments in the plaint, that the plaintiffs are indorsees for value before the bill became due, and without notice of the alleged agreement with the acceptor; and, since the plaintiffs are not affected by the alleged collateral arrangement, their belief of the matter is immaterial; besides, Mathews answers that he neither knew nor believed it. Further, these interrogatories do not specify the period at which the knowledge and belief is sought to be ascertained. In fact, substantial answers have been given to the material questions; and the object of immaterial interrogatories can only be to embarrass and delay the plaintiffs. According to the English practice, immaterial interrogatories cannot be filed, because a motion for leave to exhibit interrogatories must be upon notice to the opposite party; otherwise, a conditional order only is granted in the first instance, which may be opposed on motion to make it absolute.

W. Smith was not called upon to reply.

LEFROY, C. J.

The question is, whether the answers to these interrogatories are sufficient, or purely evasive? We cannot now inquire into the materiality of the interrogatories, unless it clearly appears upon the face of them that they have been framed for the purpose of delay, and have nothing to do with the object of the suit. Nothing of that kind appears in this case; and I should say generally, that an objection to interrogatories should be made by a substantive motion, and that upon a motion like the present, in which the question is, have the interrogatories been answered, a party cannot fall back upon the materiality of the interrogatories themselves. We are of opinion that the plaintiffs in this case have not answered, but on the contrary have left unanswered, those questions which are most necessary to elicit the truth. It has been said that this application is framed merely to gain time; but the answer to that objection is, that the plaintiffs, who say so, themselves consented to the postponement, and requested that

M. T. 1858.
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 REYNOLDS
 v.
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 FIELD.

the motion should stand over. They did not ask for additional time to answer, because they had it in their own power to have answered at once, and thus to have prevented this motion from being used as an instrument for delay: besides, it was so short a matter, that they might have put in their answers in sufficient time to have had a trial at the ensuing After-sittings. If we were to act upon speculation, we should necessarily be led to the supposition, from the resistance which has been offered to answering these interrogatories, that the plaintiffs do not desire to give information which may be prejudicial to their interests. Under these circumstances, although we shall not proceed to grant an attachment, we shall nevertheless give the defendant the same benefit which he would have had if his motion for attachment had been granted, by ordering the plaintiffs to put in further answers, and by staying the proceedings in the action in the meantime.

CRAMPTON, J.

This is a new practice in this Court, and the course here is not in accordance with the practice of the Court of Chancery. The defendant has taken the only course open to him under the statute, by moving for this attachment. No reply has been given to the defendant's complaint, for it is manifest that these answers are insufficient. The argument put forward on behalf of the plaintiffs is, that the answers are substantially sufficient; but that is not an argument which can prevail, when the question is, whether the interrogatories have been answered or not? It is too late now for the plaintiffs to say that the interrogatories have not been answered because they are immaterial; the plain course in such a case is to make a motion to strike out the immaterial interrogatories, or such part of them as may be deemed to be immaterial.

PERRIN and O'BRIEN, JJ., concurred.

The following order was made:—

Let the plaintiffs, within one fortnight, further and more and sufficiently answer the interrogatories; the action to be stayed in the interim, and the plaintiffs to pay the costs of the motion.

Nov. 22.

NOTE.—The Court now extended the time for the further answering of the interrogatories, by the plaintiff Reynolds, to six weeks, it appearing that he was absent in a distant part of the Continent. Costs of the motion to be costs in the cause.

M. T. 1858.
Queen's Bench.

BARNETT v. HERON.*

Nov. 18.

THE plaintiff obtained a verdict in an action against the defendant for £54. 8s. The plaintiff's attorney, without having taxed the costs, marked judgment only for the amount of the verdict, and issued a writ of *fieri facias*, directed to the Sheriff, who thereunder levied the sum of £22. 11s. 9d. The balance due to plaintiff for principal and interest on foot of the judgment, and also the costs of registering the said judgment as a mortgage, as ascertained by an account furnished by the plaintiff's attorney, were subsequently paid by the defendant. The plaintiff's costs of the action having been taxed at a sum of £34. 9s. 9d., upon the defendant tendering to the plaintiff a satisfaction piece for his execution, pursuant to the provisions of the Common Law Procedure Act (Ireland), 1853, s. 143, he refused to execute the same, until the amount so taxed for the costs of the action was paid.

A. Close, upon the 4th of November last, having obtained a conditional order that a memorandum of satisfaction of the said judgment be entered upon the record, under s. 144 of the Common Law Procedure Act (Ireland), 1853, although the said costs were not paid—

Where a party, without having taxed his costs, issues execution upon a judgment marked only for the amount found for him by verdict, he thereby waives his claim to the costs; and the Court, upon being satisfied that the amount of the judgment has been fully paid, will order a memorandum of satisfaction to be entered, pursuant to the Common Law Procedure Act 1853, s. 144.

Harrison now showed cause.

A. Close, contra.

The plaintiff, by entering up judgment only for the amount found for him by the verdict, must be taken thereby to have waived all claim to the costs of obtaining such judgment. *Smith v. Dickinson* (a) shows that a party cannot have two executions, one for the amount found by the verdict, and another for his taxed costs.

CRAMPTON, J.

The question in this case is, whether the Court, in the exercise of its discretion, will order satisfaction of the judgment to be entered, it appearing that a sum still remains due for costs? The account, however, with which the defendant has been furnished, coming, as it does, from the plaintiff's attorney, appears to me to be decisive as

(a) 5 Q. B. 602.

* *Coram Crampton, J.*

M. T. 1858. to the amount due on foot of the judgment having been satisfied,
Queen's Bench and I must therefore make the conditional order absolute, with
BARNETT costs.*

v.
HERON.

* Upon the point as to the waiver of the costs, see *Messiter v. Dynley* (4 Taunt. 289); *Somerville v. White* (5 East. 145).

Nov. 20.

COOPER v. OWEN.*

Leave granted to have a case tried by a special jury, although the plaintiff had omitted, within the prescribed time, to give the defendant notice of his intention to have the case so tried.

DIX applied, under sec. 113 of the Common Law Procedure Act, 1853, for leave to have this case tried at the ensuing After-sittings, by a special jury, although the plaintiff had omitted to serve the defendant with notice of his intention to have the case so tried, at the same time that he had served notice of trial. Notice had, however, been given in due time to the Sheriff, by whom no objection had been made, and who, upon his fees having been paid, had furnished the plaintiff with a copy of the special panel.

Application granted.

* *Coram LEFRROY, C.J., PERRIN and O'BRIEN, JJ.*

M. T. 1858.
Queen's Bench

SMITH v. ADAMS.*

ADAMS v. SMITH.

Nov. 18.

THIS was an action to recover a balance due for the freight of a cargo of corn brought from Varna to Dublin. The summons and plaint was issued on the 25th of October 1858, against Adams, the defendant, who was the indorsee of the bill of lading; and, on the 11th of November 1858, Smith, the plaintiff, marked judgment for £298. 14s. 2d. It appeared by the affidavit, that Adams had brought a cross-action in this Court against Smith, for £600, for damage sustained by the corn during the voyage. That on the 6th of November an order was obtained to substitute service of the plaint in the cross-action on Smith, who was resident in England, and that on the 10th of November, a notice was served upon the attorney for Smith, offering to pay the amount of the freight into Court, to abide the result of the cross-action; this offer was refused, and judgment was marked on the 11th November. It also appeared by the affidavit, that Smith had no property in Ireland, and circumstances were set forth tending to show that there might be difficulty in realising any damages recovered against him in the cross-action.

In an action for freight, by A, and a cross-action against A for injury to the cargo by negligence, the Court refused to stay the former action, after judgment, on the terms of lodging the amount of freight in Court, to abide the result of the cross-action, though A was resident in England, and had no property in this country.

J. E. Walsh (with him *J. F. Townsend*) moved that the proceedings in the original action might be stayed until the cross-action had been tried, upon the terms of Adams, the defendant in the original action, bringing into Court the amount which was claimed in that action for freight. He cited *Apostolu v. White* (a), in which case the Court of Common Pleas had stayed proceedings in an action for freight, upon terms similar to those now offered, until the trial of a cross-action then pending in the Court of Exchequer, for injury to a cargo.

Gibbon, contra, distinguished the case of *Apostolu v. White*, upon the ground that the motion had been made in that case before judgment was marked, and that the plaintiff, Apostolu, was a Greek, against whom any proceedings to enforce a judgment would be necessarily fruitless; while, in the present case, if a judgment were

(a) *Post*, p. xxii.

* Before the Full Court.

M. T. 1858. recovered against the defendant, in the cross-action, it might be sued
Queen's Bench
 upon in England.

SMITH

v.

ADAMS.

Per Curiam.

Judgment has been actually marked, and we cannot deprive the plaintiff of his right to enforce it.

Motion refused with costs.

APOSTOLU v. WHITE.

E. T. 1858.
April 18.

(Common Pleas.)

Such an order made before judgment, where the plaintiff claiming the freight was a foreigner.

J. E. Walsh (with him Harris), on behalf of the defendant, moved that the proceedings in this action should be stayed until after the trial of the issue in a cause then pending in the Exchequer, wherein the defendant in the present action was plaintiff, and the plaintiff in the present action was defendant, on the terms of the defendant bringing into Court the amount of the plaintiff's claim, to abide the order of the Court.

Per Curiam.

Let the defendant in this action forthwith give a consent for judgment for £354. 0s. 9d., and also, on or before the 2nd day of May next, bring in and lodge in Court, to the credit of this cause, the said sum of £354. 0s. 9d.; and that a stay be put on the paying out of said sum, until the result of the trial in the Exchequer, of the cause of *White v. Apostolu*; the defendant in this cause hereby undertaking to sign a consent to change the venue in said Exchequer cause from Waterford to Dublin, and to go to trial at the Sittings after Trinity Term; and that, if there be a verdict for the defendant in the said Exchequer cause, or if the plaintiff therein shall make default in not going to trial, the plaintiff in the cause shall be at liberty to draw the said sum of £354. 0s. 9d., without further order; but if there be a verdict in the said Exchequer cause for plaintiff, then he shall be at liberty to make such application as he may be advised, against said sum brought into this Court in this cause.

M. T. 1858.
Queen's Bench

HENRY HABGOOD and CATHERINE HABGOOD his Wife

v.

The Rev. CHARLES PAUL, Clerk.*

Nov. 22.

The plaint complained, in the first count, that the plaintiffs were domestic servants, natives of and ordinarily resident in England, and that the defendant, on the 23rd of March 1858, in London, engaged the plaintiffs to become his servants, and to proceed to his residence at Portumna in Ireland, at certain wages; and also upon the terms that in case the defendant should dismiss them from his said service, that he would furnish the plaintiffs with the money necessary for their travelling charges to London. The plaintiffs then averred that they entered into the service of the defendant, and were brought by him from London to Portumna, and continued in the said service until the 10th of August then last, when the defendant dismissed them from his service, and did not procure the plaintiffs, or either of them, to be conveyed to London, or furnish them with funds for travelling expenses, though required so to do.

In the second count the plaint complained that the defendant, upon another and different occasion, employed the plaintiffs to serve him in the same manner and place and upon the same terms as stated in the first count, and dismissed them, and did not provide them, or either of them, with the means of returning to London, according to said agreement, but, on the contrary, requested that they would proceed to Dublin, and endeavour to procure employment there, and, for the purpose of travelling expenses thither, furnished the plaintiffs with the sum of ten shillings; and that, in accordance with said request, plaintiff and his said wife came to Dublin, and endeavoured to procure employment there, but failed so to do; and that the plaintiffs gave defendant notice of the same, and requested defendant either to have them conveyed to London, in pursuance of said agreement, or to furnish them with the necessary travelling charges for proceeding thither, but defendant neglected and refused to comply with said request, &c.

Defence.—That the alleged causes of action in the first and

obliged to dismiss them for misconduct, he should not furnish them with travelling expenses; and averred a dismissal for drunkenness, wherefore the defendant refused to furnish the plaintiffs with such travelling expenses.—*Held*, a good defence within the spirit of the Common Law Procedure Act, as putting in issue the real question, viz., what was the contract between the parties.

* Before the Full Court.

A plaint, in two counts, respectively alleged that on two different occasions the defendant hired the plaintiffs in London, to serve him as domestics at his residence in Ireland, and agreed that if he dismissed them he would supply them with travelling expenses back to London; and having averred performance of the contract by the plaintiffs, the plaint assigned as breach that the defendant dismissed the plaintiffs, and refused to supply them with such travelling expenses. The defence alleged that the two causes of action were one and the same, and that the defendant did not contract with the plaintiffs as alleged, but engaged them on the express terms that, if he should be

M. T. 1858. second paragraphs of the plaint respectively mentioned are one and the same ; and the defendant says that he never engaged or employed the plaintiffs or contracted or dealt with or requested them in manner and form as in either of said paragraphs alleged ; but says that he engaged and employed the plaintiffs as such servants, upon the express terms that if he should be under the necessity of dismissing either of the plaintiffs for misconduct, he should not furnish the plaintiffs with any money for travelling charges to London ; and the defendant was afterwards under the necessity of dismissing the male plaintiff, and did then and there dismiss him, for misconduct, to wit, for drunkenness, and, therefore, refused to furnish the plaintiffs with any money for travelling charges to London, as he lawfully might ; which are the alleged breaches of contract in the said paragraphs respectively mentioned : and the defendant denies that the plaintiffs sustained the alleged special damage.

Mackey moved to set aside this defence, as pleading two matters, without leave of the Court, either of which would be an answer to the action, and that the first part of the defence traversed every material matter of fact stated in the plaint, and that the second part was framed in confession and avoidance, without being expressly pleaded, and as embarrassing and calculated to delay the fair trial of the action.

C. Barry, contra, contended that the defence was single in its form, and within the spirit of the Common Law Procedure Act. That an unlimited traverse of the contract would be sufficient ; but far more disadvantageous to plaintiffs, as the defendant under that traverse might rely on any variance, or that the contract was void under the Statute of Frauds, and so forth ; but this mode of pleading, traversing the contract as alleged by the plaintiffs, but admitting a contract, and putting in issue the real and substantial point in controversy, namely, the existence or non-existence of the particular terms of the contract, was far more in accordance with the spirit of the Common Law Procedure Act. He cited *Boake v. McCracken* (a) : *Hart v. Denny* (b). He also argued that this was substantially the form in which, in England, Railway Companies defended actions for breach of contract, where they relied on a special term or condition.

Mackey replied.

LEFROY, C. J.

If we were to hold that this form of defence was a bad one, I

(a) 6 Ir. Com. Law Rep. 259.

(b) 1 H. & N. 609.

do not know how parties could defend themselves when they are unable to deny the fact of having made a contract, but when the contract which they did make was different from that alleged by the plaintiff. A defence in this form brings the matter to the true question, what was the contract? The plaintiffs say that it was one form of contract, the defendant says it was of another and different kind. It is the spirit of the Common Law Procedure Act that a case should be tried upon its merits, and that technical defences should not be set up; and this defence puts in issue the substance of the matter.

M. T. 1858.
Queen's Bench
HABGOOD
v.
PAUL.

Motion refused with costs.

MOORE, Executor of WALLACE, v. BROWNE.*

Nov. 22.

THIS was an action for an illegal distress, which was tried before LEFROY, C. J., at the Summer Assizes, 1858, at Naas. A verdict had been found for the defendant, with liberty to have it turned into a verdict for the plaintiff upon a point reserved at the trial by the learned LORD CHIEF JUSTICE. A conditional order to enter a verdict for the plaintiff, pursuant to the leave reserved, having been obtained on the 5th of November last—

The plaintiff in an action having died after the trial of the cause, and a conditional order to enter a verdict, on a point reserved at the trial, having been obtained in the name of the plaintiff, without noticing his death, it appearing that the attorney was not, at that time, aware of his death; the Court ordered the conditional order to be discharged, without prejudice to such application as the personal representative of the plaintiff might be advised to make.

J. Byrne (with him *Dowse*) now appeared to show cause, but objected, in the first instance, that the conditional order was irregular, and ought to be discharged. It appeared by the affidavit of the attorney for the defendant, that the plaintiff had died in the interval between the trial and the obtaining of the conditional order.

J. T. Ball, contra.

The affidavit of the attorney for the defendant states that the death of the defendant was accidental, and that he had not heard of it until the 20th of November last. I submit that the Court ought not to suffer an injustice to be done to the estate of the plaintiff, but ought to direct the argument to proceed for showing cause against the conditional order, and to put the defendant under terms not to raise this objection: *Griffith v. Williams* (a); *Freeman v. Rosher* (b); Common Law Procedure Act, 1853, ss. 155, 159.

(a) 1 Cr. & Jer. 37.

(b) 13 Q. B. 780; S. C. 18 L. J., Q. B., 340.

* Before the Full Court.

M. T. 1858.*Queen's Bench***MOORE****v.****BROWNE.****O'BRIEN, J.**

The 157th section appears to contemplate such a case as the present: before the conditional order was applied for, the death of the plaintiff should have been suggested to the Court, and if no personal representative had then been raised to him, a special application might have been made to the Court, to extend the time for moving for the conditional order.

LEFROY, C. J.

This conditional order was obtained erroneously and improperly, because in fact there was no person before the Court who was answerable to the defendant for the costs.

Dowse, in reply.

In *Freeman v. Rosher* (a), the executors of the deceased defendant had authorised the motion, and were therefore before the Court, and answerable for the costs of the motion.

Per Curiam.

Let the conditional order be discharged, without prejudice to the representative of the plaintiff making such application to the Court as he may be advised.

(a) *Supra.*See *Rutledge v. Rutledge* (4 Ir. Com. Law Rep., 424).**Consolidated Chamber.****M'KENNA****v.****THE CHESTER & HOLYHEAD RAILWAY COMPANY.*****Nov. 30.**

Leave granted to the defendants, for leave to deliver to the plaintiff certain interrogatories which were already prepared, pursuant to the Common Law Procedure Act, 1856, section 56, and for an extension of the time for pleading, until the interrogatories should be answered. This was an action to recover the value of a portmanteau and its contents, being a portion of the plaintiff's personal luggage, alleged by him to have been lost by the neglect of the defendants, and the time of pleading extended until the interrogatories should be answered.

* *Coram RICHARDS, B.*

defendants' servants. There was no indorsement of particulars of demand, but the summons and plaint stated that the contents of the portmanteau were, "ten suits of clothes, twenty shirts," &c., for which the plaintiff claimed £300. The affidavit on which the motion was grounded was made by the defendants' attorney, they being a corporation.

1858.
Consol. Cham.
 M'KENNA
 v.
 CHESTER
 AND
 HOLYHEAD
 RAILWAY.

J. C. Nelligan, for the motion.—[RICHARDS, B. Is there any instance of an order such as you seek, having been made before plea pleaded?—Yes; in *Sharp v. The Great Southern and Western Railway Co.*,* the Court of Queen's Bench allowed the Company to deliver such interrogatories as they might be advised, to the plaintiff, before defence filed. The 56th section of the Common Law Procedure Act, 1856, allows interrogatories to be delivered "at any time" by leave of the Court or a Judge. The affidavit to support this motion, as required by section 57, although made by the defendants' attorney, is sufficient, the defendants being a corporation.

RICHARDS, B.

The case in the Queen's Bench which you have cited is a precedent which may very properly be followed on the present occasion. You may interrogate the plaintiff, and the time for pleading may be extended, as was done in the case in the Queen's Bench.

The following order was made:—

That the defendants be at liberty to deliver to the plaintiff, or his attorney, the said interrogatories in writing, and that the plaintiff do, within ten days after service of this rule and of the said interrogatories, answer the questions in writing, by affidavit to be sworn and filed in the ordinary way, &c. (following the order in the case in the Queen's Bench).

* That case is as follows:—

(*Queen's Bench Chamber, 3rd April 1857.*).

SHARP v. THE GREAT SOUTHERN & WESTERN RAILWAY CO.

C. R. Barry, for the defendants, moved for liberty to deliver interrogatories to the plaintiff, and to extend the time for pleading, until the interrogatories should be answered.

Per Curiam.—Let the defendants be at liberty to forthwith deliver to the plaintiff, or his attorney, such interrogatories as they may be advised; and thereupon that the plaintiff, within ten days after such delivery, do answer the questions put in writing, by affidavit to be sworn and filed in the ordinary way; and that the time for the defendants filing their defence to the summons and plaint be enlarged for one fortnight, from this day, they undertaking to take short notice of trial, if necessary.

1858.

Consol. Cham.

Nov. 30.

ARMSTRONG v. EVANS.*

A plea, proved by letters of the defendant himself to be false and frivolous, and which, upon the face of it, is calculated to embarrass and delay the action, and is also vicious in point of law, will be set aside, with costs, and leave given to mark judgment.

O'Driscoll moved to set aside this defence, and to mark judgment forthwith, on the ground that the defence was false, frivolous, tricky, and framed so as to embarrass and delay the plaintiff, citing *M'Kenna v. Burke* (a); *Loughran v. Hill* (b); *Horner v. Keppell* (c); *Knowles v. Burward* (d); *Balmanno v. Thompson* (e); *Levy v. Railton* (f); *Nutt v. Rush* (g); *Fer. Prac.*, p. 268; and *Common Law Procedure Act*, 1853, s. 83. He also read letters from the defendant to the plaintiff, promising to pay the amount of the promissory note, and offering a consent for judgment.

Ogle (with him *J. Fraser*).

In all the cases cited, the defence was set aside, as being clearly false upon the face of it. They cited *Smith v. Blackwell* (h); *La Forest v. Langan* (i).

RICHARDS, B.

This is a very curious plea, one most difficult to understand the meaning of, and very likely to embarrass the plaintiff. It is a vicious plea, because it sets out a parol agreement, by which it seeks to alter and vary the note upon which the action is brought. I feel strongly that such a plea as this should not be allowed to stand. It is also false upon the defendant's own showing, as is apparent from the letters which have been read; and which places him in this dilemma, that either his letters are false and his plea is true, or his plea is false and his letters are true. I will set aside this plea, with costs, and allow the plaintiff to mark judgment forthwith.

(a) 5 Ir. Com. Law Rep. 110. (b) 6 Ir. Com. Law Rep. 385.
(c) 10 Ad. & El. 17. (d) 10 Ad. & El. 19.

(e) 8 Sc. 306.
(f) 19 Law Jour. 16, Q. B.; S. C., 14 Jur. 19.
(g) 4 Ex. 490. (h) 4 Bing. 512.
(i) 4 Dowl. Pr. Cas. 642.

* *Coram RICHARDS, B.*

WILLANS v. PATERSON.*

1858.
Consol. Cham.
Dec. 3:

MOTION for security for costs.—Defence had been filed, but notice had been at the same time served on the plaintiff's attorney, that the filing of such defence should not prejudice the motion for security for costs. The affidavit on which the motion was grounded was made by the defendant's attorney.

The affidavit upon which the motion for security for costs is grounded must be made by the defendant himself, and not by his attorney, except under special circumstances.

R. McDonnell, for the motion.

R. Dowse, contra, objected on two grounds: first, defence has been filed.—[RICHARDS, B. The notice stating that the filing of the defence shall not prejudice the present motion is an answer to that objection.]—Secondly, the affidavit in this case is not made by the defendant himself, but by his attorney. This is never allowed, except under peculiar circumstances, none of which are shown by the present affidavit.

RICHARDS, B.

This second objection is fatal to the motion, which I must refuse, with costs.

* *Counsel RICHARDS, B.*



MARCHBANKS v. FLEMING;

And in the matter of the Bill of Sale duly executed by the said E. M. Fleming, and the Act of 17 & 18 Vic., c. 55.

Dec. 3.

HARTY, on behalf of the grantor of a bill of sale, applied for an order that a memorandum of satisfaction should be written upon the said bill of sale, pursuant to section 6 of the 17 & 18 Vic., c. 55, the debt secured by such bill of sale having been paid off.

The jurisdiction to enter a memorandum of satisfaction upon a bill of sale, under section 6 of the 17 & 18 Vic., c. 55, is peculiar to the Court of Queen's Bench; and a Judge of another Court, sitting in the Consolidated Chamber, cannot exercise it.

RICHARDS, B.

I have no jurisdiction in this case. The jurisdiction is one peculiar to the Court of Queen's Bench; and the application, therefore, must be made to a Judge of that Court.



Harty, on the 7th of December, renewed the application.

e

1858.
Consol. Chem.
 MARCHBANKS
 v.
 FLEMING.

CRAMPTON, J., made the following order:—

Let the Master of this Court be at liberty to enter a memorandum of satisfaction upon the said bill of sale.

NOTE.—Section 6 of the 17 & 18 Vic., c. 55, is as follows:—"It shall be lawful for any Judge of the said Court of Queen's Bench to order a memorandum of satisfaction to be written upon any bill of sale, or copy thereof respectively, as aforesaid, if it shall appear to him that the debt (if any) for which such bill of sale is given as security shall have been satisfied or discharged."

JOHNSTON v. BRISCOE.*

Dec. 7.

Where the Plaintiff applied for leave to take the summons and plaint in this case off the files of the Court, in order that it might be re-served, the process-server having neglected to indorse the date of the service, as required by the Common Law Procedure Act, 1853, s. 31. The defendant had not appeared.

Common Law Procedure
Act, 1853,
s. 31, leave
was granted to take the plaint off the file, for the purpose of having it re-served.

Motion granted.

NOTE.—See *Studdert v. Talty* (7 Ir. Com. Law Rep. 543).

* *Coram Crampton, J.*

THE UNITED GENERAL LIFE ASSURANCE COMPANY

v.

BEALE.*

Dec. 10.

The filing of MOTION for security for costs; the plaintiffs being resident and his defence does not pre- carrying on business out of the jurisdiction. It appeared that the clude a party, under the 52nd action was brought by the plaintiffs, an Assurance Company, against General Order 1854, from the defendant, for the purpose of recovering £23, alleged to have obtaining se- been received by him as their agent. The defendant admitted the security for costs plaintiffs' claim, to the extent of £10, which he tendered to the upon his serv- plaintiffs after action brought, but which was refused. The time ing the oppo- site party with for pleading being about to expire, the defendant pleaded, to the notice that such defence is filed without prejudice to the motion for security for costs.

Upon a motion for security for costs, it is sufficient if the affidavit of merits disclose a defence to part of the action.

* *Coram Crampton, J.*

entire action, payment into Court of £10, and that he was indebted to no greater extent; at the same time serving notice upon the plaintiffs' attorney, that the defence was filed without prejudice to the present motion.

Jellett, for the motion.

The course pursued here is that prescribed by *Taylor v. Low* (a). *Fox v. Atkinson* (b) shows that it is sufficient if the affidavit of merits disclose a defence to a part of the action.

Carr, contra, relied on the 52nd General Order 1854, and objected to the sufficiency of the defendant's affidavit.

CRAMPTON, J.

This motion is perfectly regular, and the affidavit quite sufficient. I shall, therefore, make the order sought.

(a) 3 Ir. Com. Law Rep. 223.

(b) 7 Ir. Jur. 259.

1858.
Consol. Cham.
UNITED
GENERAL
LIFE ASSUR-
ANCE CO.
v.
BEALE.

GREENE v. FITZPATRICK.*

Dec. 10.

MOTION to have a *stet processus* entered upon the proceedings, under these circumstances: it was an action of ejectment for non-payment of rent, brought in 1857. On the 22nd of May 1858, the defendant's attorney entered the rule to proceed to trial under section 106 of the Common Law Procedure Act 1853. The plaintiff not having done so, the defendant's attorney, in the month of July 1858, informed the plaintiff's attorney that he would hold the plaintiff responsible for the costs incurred by the defendant. In October 1858, the defendant came in person to the plaintiff's attorney, when it was agreed between them that, in consideration of the defendant surrendering the premises, the plaintiff would forgive her two and a-half years' rent, each party paying their own costs; which agreement was reduced into writing, in the shape of a letter dated the 7th of October 1858, from the defendant to the plaintiff. On the 26th of November 1858, the defendant's attorney filed the affidavit of the service of the rule of May 1858, and entered the peremptory order for the payment of his costs, under the said 106th section.

Where the defendant, without the concurrence of her attorney, compromised the action, the Court, at the instance of the plaintiff, entered a *stet processus* upon the order to proceed to trial, obtained by the defendant's attorney, under section 106 of the Common Law Procedure Act 1853.

* *Coram Crampton, J.*

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GREENE
 v.
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E. Johnstone, for the motion, contended that the plaintiff and defendant had a perfect right to settle the case without the intervention of their attorneys, there being no evidence of collusion between the plaintiff's attorney and the defendant to defraud the defendant's attorney of his costs. *Quested v. Callis* (a) shows that the attorney of the defendant has not such an interest in the action as to prevent the parties from compromising it without his consent. All the cases which will be cited on the other side were cases where the attorney was the attorney of the *plaintiff*, not of the defendant: *Lush's Prac.*, p. 226, 2nd ed.

Jordan, contra.

When a party goes behind his client's back, the Court will protect the attorney, and prevent the parties from depriving him of his costs: *Nugent v. O'Brien* (b); *Sullivan v. Murphy* (c); *Brown v. Walsh* (d).

CRAMPTON, J., made the following order:—

Let a *stet processus* be entered. No costs of the proceedings, or of this matter, to either party.

(a) 10 M. & W. 18.
 (c) 4 Ir. Jur. 155.

(b) Black., Dun. & Osb. 208.
 (d) 1 Ir. Com. Law Rep. 480.

BYRNE v. SHERLOCK.*

Dec. 14.

Leave granted T. WHITZ applied for leave to substitute service of the notice of the filing of the summons and plaint in this cause. It appeared by affidavit that the defendant had been duly served with the plaint, but had left Ireland immediately afterwards.

Leave granted
 to substitute
 service of the
 notice of filing
 the summons
 and plaint, the
 defendant hav-
 ing been duly
 served with
 the plaint, but
 having left
 Ireland imme-
 diately after-
 wards.

BALL, J.

This is a case of first impression; but I think that on principle you are entitled to the order; the plaintiff would otherwise be deprived of all remedy by the act of the defendant, who left the country after having been duly served with the plaint.

* *Coram BALL, J.*

H. T. 1859.
Queen's Bench

Jan. 14.

MAXWELL v. NEWTON.*

G. Fitzgibbon applied for a conditional order for a new trial, upon the grounds, first, that the verdict found for the plaintiff was against the weight of evidence; secondly, on the ground of the admission of illegal evidence; and thirdly, on the ground that one of the plaintiff's witnesses having been examined and cross-examined before Commissioners in America, the plaintiff declined to read any portion of his evidence at the trial.

LEFROY, C. J.

We will grant you the conditional order, upon the first two grounds, but not upon the third ground, as that would be *moveare quieta*; it being now well settled, that a party may read the evidence of his own witnesses or not, as he pleases, and if he do not, the other side may do so.

The Court will not grant a conditional order for a new trial, on the ground that, at the trial, one of the parties declined to read the evidence of one of his own witnesses, taken abroad, under a commission, it not being obligatory on him so to do, and it being open to the other side to read such evidence, or any portion of it which he thinks fit.

* *Coram Lefroy, C. J., Perrin and O'Brien, JJ.*

HENRY HABGOOD and CATHERINE HABGOOD his Wife**v.****THE REV. CHARLES PAUL, Clerk.***

Jan. 13.

MOTION for security for future costs.—It appeared by the affidavit of the defendant, that the plaintiffs, who were natives of England, had been resident in London, and came to this country in the service of the defendant; and that since the defence had been filed to the action, the plaintiff Henry Habgood had returned to London, and, as the defendant believed, for the purpose of residing there permanently. The plaintiff Catherine Habgood, however, who was still resident in Ireland, stated in her affidavit that her husband would return to Ireland, and that it was his intention to return, but did not state that his return was for the purpose of residing permanently in this country.

Where husband and wife, natives of England, who came to this country in the service of the defendant, had jointly commenced an action against the defendant, and the husband, after a defence had been filed, had returned to

England, as the defendant believed, permanently to reside there, a motion for security for future costs was granted, notwithstanding that the wife was resident within the jurisdiction, and stated in her affidavit that her husband intended to return to this country.

* Before the Full Court.

H. T. 1859. *C. R. Barry*, for the motion, on behalf of the defendant, cited
Queen's Bench *O'Grady v. O'Connell* (a).

HABGOOD

v.
PAUL.

Mackey, contra, contended that the plaintiff Henry Habgood was only temporarily absent from this country, and relied on the fact that his wife, who was a co-plaintiff, resided within the jurisdiction; he cited *Conway v. Wilson* (b); *Drummond v. Tillinghast* (c); *Tambisco v. Pacifico* (d).—[O'BRIEN, J. If the plaintiff should return to reside permanently in Ireland, an application may be made to this Court to vacate the order for security for costs.]

LEFROY, C. J.

The only case which creates any embarrassment is *Conway v. Wilson*; in that case, however, the plaintiff was a sea-faring man, trading between Ireland and America, and having a residence in this country, thus raising an inference of an *animus revertendi*. We shall grant the motion as to future costs.

Motion granted.

(a) 2 Ir. Jur. 94.

(b) 2 Ir. Com. Law Rep. 47.

(c) 16 Q. B. 740; S. C., 15 Jur. 384.

(d) 7 Exch. 816; S. C., 21 L. J., Exch., 276.

NOTE.—This case is reported, *ante*, p. xxiii, on another point.

NOTE.—See, as to security for costs, *Leckham v. Gresham* (2 Ir. C. Law Rep. 139); *Taylor v. Low* (3 Ir. C. Law Rep. 223); *Makony v. Keleher* (6 Ir. Jur. 239); *Hodson v. McQueen* (7 Ir. C. Law Rep. 288); *Allain v. Chambers* (8 Ir. C. Law Rep., App., vii); *The United General Life Assurance Company v. Beale* (*ibid.*, xxx). As to vacating the order, *Eyre v. Baldwin* (4 Ir. C. Law Rep. 270). As to the nature of the affidavit, in addition to the cases cited, *Fay. Com. Law Pract.*, 2nd ed., pp. 70, 71; *Willans v. Paterson* (8 Ir. C. Law Rep., App., xxix); *The United General Life Assurance Company v. Beale* (*ibid.*, xxx).

H. T. 1859.
Queen's Bench

Jan. 17.

SMYTH v. SCOTT.*

ACTION on a promissory note for £400, by payee against maker. Defence ; that the defendant did not promise as in the summons and plaint alleged. It appeared by affidavit that the whole sum of £400 was due, above all just credits and allowances.

F. W. Brady moved to set aside this defence, as contravening the provisions of the Common Law Procedure Act 1853, s. 70, and as amounting to the general issue ; he also applied for leave to mark judgment.

W. Johns, contra, submitted that the provisions of the 70th section were directory and not mandatory, and that, as an issue framed in the terms of the defence would put the making of the note in issue, the plaintiff could not be embarrassed in such a manner as contemplated by the 83rd section of the same Act under which the present motion was made.

LEFROY, C. J.

The Legislature has put its own meaning upon this Act of Parliament, by giving a form of defence to an action on a promissory note, when the defendant seeks to deny the making of the note.

W. Johns then applied for leave to amend the defence, which was refused, it appearing that the whole sum claimed by the plaintiff was actually due on foot of the note.

Defence set aside, and leave given to mark judgment.

* *Coram LEFROY, C. J., PERRIN and O'BRIEN, JJ.*

STERNE v. JONES.*

Jan. 17.

MOTION on behalf of the defendant, as executrix of J. Jones, that all proceedings in the present action should be stayed, until there

atrix of C, and having afterwards presented a cause petition under the 15th section of the Chancery Regulation Act, for the administration of C's estate, upon which the usual order of reference was made, without notice to B, upon the same day on which B filed a defence to the action ; the Court, upon the application of the defendant, stayed the action, under the 22nd section of the Chancery Regulation Act, the leave of the Master not having been obtained, as required by that section.

Sensible.—A, upon presenting the cause petition to the Court of Chancery, ought to have apprised B, by notice, of that fact, and of his intention not to proceed with the action.

* *Coram LEFROY, C. J., PERRIN and O'BRIEN, JJ.*

H. T. 1859.
Queen's Bench

STERNE
 v.
 JONES.

was first obtained, under the Court of Chancery (Ireland) Regulation Act 1850, s. 22, the written leave to proceed, of the Master in Chancery, to whom a cause petition had been referred under the 15th section of the same Act, for the administration of the assets of said J. Jones, in which cause petition the present plaintiff was petitioner and the defendant and others respondents. It appeared by the affidavits, that the present action, which was one of debt, was brought by the plaintiff as town agent of the said J. Jones, against the defendant, who was the sole executrix of said Jones. The summons and plaint was served upon the defendant on the 6th of December 1858, and a defence thereto was filed on the 23rd of the same month. The plaintiff having written to the defendant on the 2nd of November 1858, making a personal demand for payment of his claim, as required by the 8th of the General Orders in Chancery, 1851, and, having received no answer to such demand, on the 15th of December filed a cause petition for the administration of the estate of the said J. Jones. On the 18th of December, the usual order of reference was made by the Lord Chancellor; and on the 23rd of December, the defendant was served with notice of the filing of said cause petition, with the order of reference, and copy of a summons to proceed thereunder.

Sullivan, for the motion.

This motion is in strict accordance with the principle that a party cannot proceed to enforce his demand both at Law and in Equity at the same time. The terms of section 22 of the Chancery Regulation Act are precise upon this point; and to stay proceedings, under that section, is quite a matter of course.—[He was then stopped by the Court.]

G. Fitzgibbon (with him *Lawless*), contra.

The very words of section 22, *per se*, operate as a stay of any proceedings which the plaintiff might institute.—[LEFROY, C. J. At all events, after the 18th of December, any further proceedings by the plaintiff would be illegal.]—The plaintiff took no step in the action after the 18th of December.—[O'BRIEN, J. Why did you not serve the defendant with notice, apprising her that you had instituted proceedings in Equity, and that you did not intend to proceed further with the action?]—That is unnecessary, the effect of the order of reference being, by force of the words of section 22, to render any further proceedings, without the leave of the Master, wholly illegal. The prohibition of that section is binding upon both parties; and as it gives the Court a discretion as to the costs of the action, the Court will take the merits of the action into consider-

ation.—[LEPROY, C. J. It cannot be the meaning of the Act of H. T. 1859. Parliament that the merits of the case are to be disposed of by *Queen's Bench* us; all these are matters which must be discussed in the Master's office.]

STERNE
v.
JONES.

Sullivan, in reply.

When the plaintiff wrote the letter of the 2nd of November, he had in contemplation the filing of the cause petition, the 8th General Order 1851, requiring that a demand shall have been made three weeks before the party files his cause petition for administration. Then upon the 6th of December the plaintiff files his summons and plaint. Why did he not, upon obtaining the order of reference, serve the defendant with notice that it was then unnecessary for us to put in any defence? Had the defendant not put in a defence, the plaintiff would have marked judgment against her. What right, then, has the plaintiff, who takes this double proceeding, without apprising the defendant of it, to complain if she defend herself?

LEPROY, C. J.

In this case the Act of Parliament is only intended to be in furtherance of the practice of the Court of Chancery. In that Court, a party who instituted proceedings both in Equity and at Law was liable to have one or other of those proceedings at once put an end to, and from that moment he could affect his adversary by one proceeding only. Now, the present Act of Parliament, following that practice, enables a party, when his adversary institutes proceedings in Chancery, for the same demand for which he has brought his action, to come to the Court in which the action is pending, to have that action stayed. Until one proceeding or the other is stayed, the party, in the language of the Court of Chancery, is doubly vexed, and he is entitled to defend himself against either or both such proceedings. In the present case, an action is brought against the defendant, then a cause petition in Chancery is filed against her in respect of the same demand, and the defendant has a perfect right to defend herself against both of these proceedings. The proceedings at Law, in the present instance, are not effectually stopped, so as to make it wrong in the defendant to defend herself against them, until the plaintiff, who has commenced the suit in Equity, give her notice of his having done so. There is nothing in this case to satisfy us that the proceedings in Equity would operate as a defence *in omnibus*—as a suspension of the proceedings at Law. The defendant, therefore, was right in making the present application to the Court; and we shall grant this motion with costs, and stay the action.

H. T. 1859.
Queen's Bench

Jan. 17.

A dividend payable by the assignees of a bankrupt to a creditor of the bankrupt, who had proved his debt in the Court of Bankruptcy, cannot be attached, under the Common Law Procedure Act, 1856, s. 63, by a judgment creditor of the person to whom such dividend is payable.

Where cross notices have been served, to show cause against, and to make absolute, the summoning portion of a garnishee order, the garnishee showing cause is to begin.

W. D. ANDREWS, on behalf of the plaintiff, who was a judgment creditor of the defendant, had, on the 14th of December 1858,[†] obtained the usual garnishee order, under the 63rd section of the Common Law Procedure Act, 1856, attaching the sum of £121. 10s., the amount of a dividend payable to the defendant out of the estate of Robert Scott, a bankrupt, and requiring M. Murphy, the official assignee of the Court of Bankruptcy and Insolvency, and A. Hall, the creditors' assignee, to show cause why they should not, out of the said dividend, pay to the plaintiff the sum of £80. 15s. 8d., due to him on foot of the said judgment.

An affidavit for cause had been filed by the official assignee, by which it appeared that there was in bank, when the garnishee order was made, £1150 sterling, to the credit of the assignees of Robert Scott, a bankrupt; and that, by an order of Plunket, J., of the 30th of November 1858, it was ordered that the creditors of the said Robert Scott should be paid a dividend of four shillings and six pence in the pound; upon which the usual schedule of the creditors and their debts had been made out, which was signed by the Chief Registrar of the Court of Bankruptcy and Insolvency, on the 9th of December 1858; and by which schedule it appeared that £121. 10s. was payable to the said defendant.[‡]

Pilkington,[§] for the official assignee, now showed cause.

If this order is now made absolute, the assignees in bankruptcy

* *Coram LEFROY, C. J., PEARIN and O'BRIEN, JJ.*

† *Coram BALL, J.*

‡ This case came before the Court on the 13th of January; but it appearing that the conditional order had been made only against the official assignee, the Court directed the order to be amended, by inserting the names of the creditors' assignee, and serving the order on him also.

Where a garnishee has served notice to show cause against a conditional order, he is entitled to begin, although he has filed an affidavit for cause, and the plaintiff has subsequently served notice, and appears, to make the conditional order absolute, notwithstanding cause shown.

§ Cross notices had been served, the one by the plaintiff, to make absolute the conditional order, and the other by the official assignee, who had filed an affidavit for cause to discharge the order. *Murphy v. Bennett* (7 Ir. Com. Law Rep. 9) was cited by Counsel for the plaintiff.

The Court ruled that the garnishee showing cause should begin.

The plaintiff has subsequently served notice, and appears, to make the conditional order absolute, notwithstanding cause shown.

will not be able to discharge their duties. Dividends in a bankrupt's estates are now made under the General Orders of the Bankrupt and Insolvent Court, pursuant to the 20 & 21 Vic., c. 60, s. 288 ; and those General Orders have the effect of the Act itself (a). After the produce of the estate has been lodged in bank, no money can come to the hands of the assignees, where the dividend amounts to £5 or upwards : such dividend can be paid only by a cheque payable to the creditor himself, or to some person duly authorised by him, and signed jointly by the official and creditors' assignees : *General Orders, Banktcy.*, 97, 98, 99. The creditor, before he receives his dividend cheque, must produce all securities exhibited by him at the time of his proof : *General Orders, Banktcy.*, 100. Provision is made by the Common Law Procedure Act, 1853, ss. 132, 135, for charging stock and shares standing in the name of a trustee for the debtor, or in the name of the Accountant-General of the Court of Chancery or Incumbered Estates Court, or of a Master of one of the Superior Courts of Law ; but no provision, enabling dividends in bankruptcy to be attached, is introduced into the garnishee clause of the Common Law Procedure Act, 1856 (b), which might have been done if it had been intended that dividends in bankruptcy should be attached under the latter Act. Before the Common Law Procedure Act, 1853, s. 185, was passed, it was held that a charging order could not be granted under the 3 & 4 Vic., c. 105, s. 23, to attach moneys standing in the name of the Accountant-General of the Incumbered Estates Court, or of a Master of a Court of Law : *Howlett v. Hackett* (c) ; and the official assignee of the Bankrupt Court is not mentioned in the Common Law Procedure Act, 1856, s. 63, which gives the garnishee jurisdiction to this Court. Further, this proceeding, if carried out under the garnishee clauses, is in the nature of an action at Law : *Co. Lit.* 291 b ; and the right of action for dividends in bankruptcy is taken away by the 20 and 21 Vic., c. 60, s. 298, which provides that the payment of such dividends can only be enforced by an application to the Bankrupt Court—[He was then stopped by the Court].

H. T. 1859.
Queen's Bench
 GILMOUR
 v.
 SIMPSON.

W. D. Andrews (with him *J. E. Walsh*), for the plaintiff.

Before the Legislature, by provisions which have been continued in the last Bankrupt Act, took away the right of action, a creditor who had proved in bankruptcy might have sued the assignee at Law for his dividend, in an action of assumpsit for money had and re-

(a) See s. 21.

(b) s. 63.

(c) 5 Ir. Jur. 110.

H. T. 1859. received : *Brown v. Bullen* (*a*) ; *Ex parte Alexander* (*b*) ; *Ex parte Richardson* (*c*). The 20 & 21 Vic., c. 60, s. 298, only prohibits an "action" being brought for the dividends, and cannot be taken to prevent the granting of a garnishee order, or the issuing of the writ to enforce payment under the 65th section of the Procedure Act of 1856, which is not an action, but simply a writ, to inform the mind of the Court whether the execution contemplated by the 66th section ought to be issued. The proceeding under the 66th section is analogous to a writ of revivor, which differs materially from an action : *Johnson v. Bell* (*d*). The plaintiff cannot ask for a charging order under the Common Law Procedure Act 1853, s. 132, because the fund in bank to the credit of the assignees is cash, and not stock. The charging order under that Act is wholly different from the garnishee order ; and there is no analogy to support the argument on the other side, founded upon the provisions of the Common Law Procedure Act of 1853, as to charging orders. It cannot interfere with the due discharge of the duties of the official assignee, if this order be made absolute, because, if he pay the dividend to the plaintiff instead of to the defendant, he will be completely protected by the provisions of the Common Law Procedure Act of 1856. The rules of the Bankrupt Court are not more rigid than the rules of this Court, which may, if necessary, be modified in proper cases ; but the rules in bankruptcy do not prevent this order from being carried out. The cheque for the dividend is not necessarily to be made payable to the creditor himself: *General Orders in Bankruptcy*, 98, 100. It is no objection that the plaintiff cannot produce the securities to the official assignee, because he can give to the assignee such an indemnity as is contemplated by the 100th Order ; and there are many cases where there are no securities to produce. The garnishee clauses are remedial, and the Common Law Procedure Act of 1856 is therefore in that respect to be construed liberally. It is no objection that a precedent for attaching dividends cannot be found in the ancient proceeding by foreign attachment in the Lord Mayor's Court, because that was a very limited jurisdiction of an Inferior Court. Rent, or a judgment debt, could not be attached in that Court ; yet rent (*e*) and judgment debts have been attached under the Common Law Procedure Act 1856, s. 63. The reason no precedent can be adduced, under the similar section of the English Common Law Procedure Act of 1854 is, because the English procedure in bankruptcy differs from the Irish. Under the present

(*a*) 1 Doug. 407.

(*b*) 1 Dea. & Ch. 513.

(*c*) 4 Dea. & Ch. 192.

(*d*) 6 Ir. Com. Law Rep. 527, 532.

(*e*) *Leake v. Noble* (6 Ir. Com. Law Rep. 510).

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English practice, the bankrupt's estate, when realised, is paid over to a third person, viz., the Accountant in Bankruptcy, who superintends the fund; but, in Ireland, it is lodged in bank in the joint names of the assignees. There is a privity, under the Irish practice in bankruptcy, between the creditor and the assignees; and this was the ground on which an action at Law for the dividend was formerly sustained: *Ex parte Graham* (a); which case shows that the assignees here, as formerly in England, may be regarded as the agents of the creditors, by whom they were formerly, and are still, generally put in motion. If the Court should hold that dividends cannot be attached, a large and increasing amount of property will be rendered unavailable to creditors for satisfaction of their debts; and surely dividends may be regarded, without straining the Common Law Procedure Act 1856, s. 63, to be within both the spirit and the letter of that section, which was passed for the benefit of creditors, and was intended to make available, for the satisfaction of their debts, the very kind of property which dividends have been shown to be, viz., debts due by third persons to the judgment debtors.

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Pilkington was not called on to reply.

LEFROY, C. J.

We cannot make this conditional order absolute. Certain Rules have been framed by the Court of Bankruptcy and Insolvency for the due administration of justice in that Court; on the one hand, to secure due payments to the creditors, but, on the other hand, to provide that no creditor, nor any person duly authorised by him, shall receive his dividend cheque until he has produced to the official assignee every security exhibited by him at the time of proving his debt, or, upon his accounting upon oath before a Judge for his inability to do so (b). How could compliance with this and other wholesome and useful provisions made by these General Orders in Bankruptcy be enforced, if, disregarding all these provisions, we were arbitrarily to order this money to be paid over to the plaintiff? It is to be observed also that there is a jurisdiction to make these General Orders in Bankruptcy, of equal authority with that which enables this Court to grant garnishee orders under the Common Law Procedure Act. It is not possible, therefore, to sustain this conditional order, without overruling the Bankrupt Act, and the General Orders made in pursuance of it, and destroying the precautions taken by the Bankrupt Court to afford due protection to the creditors of bankrupts in that Court.

(a) 1 Rose, 456.

(b) Gen. Order, Bankcy., 100.

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*Queen's Bench*GILMOOREv.SIMPSON.

PERRIN, J.

I concur in the judgment of my Lord CHIEF JUSTICE. I think that if we were to make this order absolute, it would interfere very much with the due administration of estates in the Court of Bankruptcy.

O'BRIEN, J.

I also concur in the judgment of the Court. There may be a *casus omissus* in the legislation upon this subject; but it must be remembered that the last Bankrupt Act was passed subsequently to the Common Law Procedure Acts. The framers of the Bankrupt Act might have supplied that omission; but they have not done so, and it is therefore impossible for this Court to hold that the official and creditors' assignees, or either of them, are *indebted* to Simpson in such a manner as to render them liable in this proceeding to the plaintiff.

Conditional order discharged with costs.

Jan. 19.

M'DOWELL v. DAVYS.*

To an action by the official manager of the T. Joint-stock Bank, against the acceptor of a bill indorsed to the Bank, with a count for money lent, the defendant having pleaded that a previous action was brought "against the defendant for the same cause," in the Court of Exchequer, "for the benefit of the said T. Bank, by one J. S., a public officer of the said Bank, which action is still pending," the Court set Joint-stock Bank, whilst the said Bank carried on the business of aside the defence as embarrassing.

MOTION to set aside the defence to an action upon a bill of exchange, as embarrassing, and calculated to delay the fair trial of the action. Plaintiff.—F. A. Davys, the defendant, is summoned to answer the complaint of G. M'Dowell, official manager, under the Joint-stock Companies Winding-up Acts 1848 and 1849, of the Tipperary Joint-stock Bank, who complains that the defendant is indebted to the plaintiff, as such official manager of the Tipperary Joint-stock Bank, in the sum of £30; for that one M. R. P., on the 13th of December 1854, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay, to the order of the said M. R. P., at the Tipperary Bank at Nenagh, £30, three months after the date thereof; and the defendant accepted the said bill, and the said bill was duly indorsed to the said Tipperary Joint-stock Bank, whilst the said Bank carried on the business of bankers, and the defendant did not pay the said bill. And the plaintiff further complains that the defendant is indebted to the plaintiff, as such official manager of the Tipperary Joint-stock Bank, in £30, for money lent by the said Tipperary Joint-stock Bank, whilst the said Bank carried on the business of

* *Coram LEFROY, C. J., PERRIN and O'BRIEN, JJ.*

bankers, and before the stopping of payment by the said Bank, H. T. 1859. to the defendant, at his request; the particulars of which are *Queen's Bench* indorsed hereon: and the plaintiff, as such official manager, prays *M'DOWELL v. DAVYS.* judgment against the said defendant to recover the said sum of £30, &c.

INDORSEMENT OF PARTICULARS.

"Dec. 18th 1854.—Money lent and advanced by the Bank to the defendant, as consideration for the indorsement of the said bill." } £30.

Defence; that, while the said Tipperary Joint-stock Bank carried on the business of bankers, a previous action was brought against the defendant for the same cause, in Her Majesty's Court of Exchequer at Dublin, on the 11th day of December 1855, for the benefit of the said Tipperary Joint-stock Bank, by one James Sadleir, a public officer of the said Bank, which action is still pending.

The action relied on by this defence was brought against the same defendant by J. Sadleir, as indorsee of the said bill, in his own name, and not as public officer of the Bank; and the plaint in that action did not contain a count for money lent.

J. Kieran, for the motion, on behalf of the plaintiff.

It is not averred, by this defence, that the previous action was between the same parties as the present action, nor that it was brought by J. Sadleir as the public officer of the Bank. This plaint states two causes of action; but the defence merely alleges a previous action "for the *same cause*." It is impossible to demur to this defence, because, by doing so, the plaintiff might be held to admit that J. Sadleir sued in the former action on behalf of the Bank, which appears upon the record not to be the fact. If issue should be taken on this defence, the Court would only grant an issue, whether the plaint in this case was for a cause of action the same as in the previous action? that is, although there are two causes of action in this plaint, yet the plaintiff would be limited in fact to one only, namely, the count on the bill. That limit the defendant is not entitled to impose upon the plaintiff, who, if he fails on one count, is entitled to resort to the other.

D. Lynch (with him *H. C. Plunkett*), for the plea.

This defence sufficiently avers that an action is still pending, which was brought for the benefit of the Bank, and for the same cause for which the present action is brought; and it is now sought, without discontinuing the former action, and paying the costs of it to the defendant, to make the defendant liable in the present action;

H. T. 1859. he ought not to be harassed by two actions for the same subject-matter.
Queen's Bench

M'DOWELL

v.
 DAVYS.

J. Kerman.

It is open to the defendant to nonsuit J. Sadleir in the former action.

LEFROY, C. J.

J. Sadleir does not appear upon the record in the former action to sue as a public officer of the Bank; and the statement in this defence, that the former action was brought "for the benefit of the Bank," is no answer in law to the present action.

Motion granted.

GRADY v. KEARNEY.

Jan. 20.

Service of the summons and plaint upon a servant of the defendant, near his dwelling-house, not sufficient under the Common Law Procedure Act, 1853, s. 32; but it appearing, by affidavit, that the process-server had been threatened with violence, and that a letter had been received from the defendant, in which he admitted the plaintiff's claim, and the receipt of the copy of the summons and plaint, service allowed to be substituted, by a letter sent through the post, directed to the address from which the defendant's letter came.

PERRIN, J.

I do not think that this service upon the servant girl is sufficient under the Common Law Procedure Act; but I will allow you to substitute service by letter sent through the post, and directed to the address from which the defendant's letter came.

* *Coram PERRIN, J.*

E. T. 1858.

Exchequer.

FIELDEN v. DONAGH.

(Exchequer).

April 30.

A. HENDERSON applied, on behalf of the defendants Francis Donagh and William Cairnes, that the order bearing date the 12th day of December 1856, made in this cause, requiring the plaintiffs to give security for costs, might be set aside, and that the defendants might be at liberty to enter a rule for a nonsuit or dismiss. The action had been brought for the recovery of three years' rent due out of certain premises in the county of Louth. The writ issued on the 21st of November 1856, and on the 12th of December 1856, the defendant obtained an order to stay the plaintiffs' proceedings until they should give security for costs. By the same order the defendants were directed to furnish to the plaintiffs a copy of a certain deed of assignment mentioned therein, which was duly furnished, but no security for costs was given, nor any further proceedings taken by the plaintiffs.

A rule to stay the plaintiff's proceedings until he give security for costs must be vacated before the defendant can apply to enter a rule for a nonsuit or dismiss.

J. Coffey, contra.

The plaintiffs have been tied up from proceeding, for the order to stay proceedings has never been vacated, and therefore the application is premature: *Read v. Shew* (a).

Per Curiam.

The principle of the case is governed by *Read v. Shew*. The defendant is entitled to discharge his own order, but the rest of the motion must be refused, with £3 costs.

Rule accordingly.

(a) 1 Ir. Law Rep. 269.

MURRAY v. SIMPSON.

M. T. 1858.
Nov. 9.

EXECUTION having issued at the suit of the defendant in this action against a third party, and the amount of the debt having been levied by the Sheriff, an application was now made, on the part of the plaintiff, that the proceeds of the execution might be attached in the Sheriff's hands to answer the plaintiff's demand.

The proceeds of an execution may be attached in the Sheriff's hands for debt due by the execution creditor.

M. T. 1858.

Exchequer.

MURRAY

v.

SIMPSON.

R. Tudor, for the motion.

The Sheriff is a debtor to the defendant, and therefore the money may be attached in his hands. Money had and received would lie for the amount: *Wms. Saund.*, p. 344, n. 2; *Atkinson on Sheriff*, p. 262.

The Court made the order.

CRASSAN v. JOHNSTON.

Nov. 25.

In an action THE action in this case was for "board, lodging, clothing and for board, lodging, &c., supplied by the plaintiff to a child of the defendant, plaintiff to a child of the defendant, at his request, a defence that no board, lodging, &c., were supplied by the plaintiff to any child of the defendant, at his request, is not double.

W. P. Carr, for the motion.

T. A Purcell, contra.

A defendant cannot traverse two material facts without the leave of the Court; but here, the question whether or not the child was the child of the defendant is immaterial. The request is the gist of the action.

PIGOT, C. B.

The plaintiff alleges that goods were furnished to a particular person, at the defendant's request; the defendant says "You did not furnish goods to that person at my request." I think it would embarrass parties exceedingly if they were obliged to split up the consideration in *indebitatus assumpsit* in the way contended for; the consideration is a single thing, the giving of the goods to the defendant's child, at his request.

Motion refused.

H. T. 1859.
Eschequer.

NORRIS v. LAWDER.

Jan. 11.

THIS was an application for liberty to serve notice of appeal from the judgment of the Court in this case, notwithstanding the expiration of the four days limited for the service of such notice by the Common Law Procedure Act 1856, s. 43.

D. Lynch (with him *E. Johnstone*), for the motion.

The Court has jurisdiction to grant this motion, the words of the 43rd section being "within four days after the decision complained of, or such further time as may be allowed by a Court or a Judge." Assuming that the Court has jurisdiction, such a fatality has occurred in this case as will warrant the Court in exercising it. The action was brought under the direction of the Master, and it was necessary to obtain his directions before notice of appeal could be served. It was found impossible to obtain the Master's directions within the time limited, although not a moment was lost in bringing the matter before him. He has now sanctioned the appeal, and the Court, it is submitted, will allow the notice to be served, there having been throughout a *bona fide* intention to appeal, and the question of law being an important one.

C. Rolleston, contra.

The Court has no jurisdiction to grant the motion. The meaning of the 43rd section is that the party has four days, or such further time as, within those four days, may be allowed by the Court or a Judge. There was nothing to prevent this motion being made provisionally within the proper time.—[PIGOT, C. B., referred to *Watson v. Lane* (a).]—It may be inferred, from the language of the Chief Baron in that case, that he thought the Court had no jurisdiction to grant the motion. At all events, this is not a case in which further litigation should be encouraged. There have been already two trials, and the only question of law in the case would not be open to the plaintiff in the Court of Error. It was discussed in the argument upon the rule for a new trial, and not the rule to enter a verdict upon the point reserved. They cannot appeal from the decision upon the motion for a new trial, as leave to appeal was not given by the Court.

Liberty to serve notice of appeal to the Court of Error, after the expiration of the regular period of four days, upon the ground that it was impossible within the four days to obtain the sanction of a Master in Chancery, for the prosecution of the appeal (the action having been brought by his direction), was refused, there having been already two trials, and there being some doubt whether the question in the case would be open in the Court of Error.—*Quare*, whether the Court had jurisdiction to grant the application?

H. T. 1859.

Exchequer.

NORRIS

v.

LAWDER.

PIGOT, C. B.

We are not disposed to yield to this application. There certainly is that in the section of the Act of Parliament which raises some question. In the case of *Watson v. Lane*, the Court of Exchequer had not the case argued before them on both sides, and they did not express any opinion upon the construction of the Act. In this case, the question arises exactly as it did in *Watson v. Lane*, in which the Court decided that, assuming they had jurisdiction, the case was not one in which it should be exercised. We are disposed to take a similar view. If this case should go to the Court of Error, I am inclined to think that the question argued before us would not be open to the appellant there. We allowed an argument before us, not upon a point reserved, but upon the motion for a new trial. If the case should now go to the Court of Error, the plaintiff would not have open to him any argument with reference to the point discussed upon the motion for a new trial, no leave having been given to go to the Court of Error at the time that motion was disposed of, and the plaintiff only resting upon the right which the Act gives him to go to the Court of Error upon the point reserved. The question, therefore, argued before us, and to which we gave a good deal of consideration, would be excluded in the Court of Error. If we were now asked for the first time to allow an appeal upon that branch of the case, I should have great difficulty in saying that the case was a proper one to be carried further. The litigation has been quite enough to satisfy all parties. For these reasons, we are disposed to adopt the course taken by the Court of Exchequer in *Watson v. Lane*.

GREENE, B.

I wish to be understood as not intimating any opinion whether a case might not arise in which the Court would have jurisdiction to allow a party to appeal after the expiration of the four days. I concur with my LORD CHIEF BARON, upon the ground that, supposing we had jurisdiction, this is not a case in which we ought to exercise it.

PIGOT, C. B.

We think it very important, however, that the attention of the Profession should be called to the peremptory words of the 43rd section.

H. T. 1859.
Exchequer.

COURTENAY v. BLAKE.

Jan. 21.

THIS was an action of libel, and the summons and plaint in the margin described the venue in the action as "city of Dublin." The present application was to set aside the summons and plaint, for irregularity, upon the ground that there was no statement in the margin of the summons and plaint of the name of any county.

E. Sullivan (with him *C. R. Barry*), for the motion.

The summons and plaint is wholly irregular. There is no venue stated, for there is no county named, and the 62nd section of the Common Law Procedure Act, 1853, is express, that "the name of such county shall be stated in the margin of the summons."—[PIGOT, C. B. Are not "city of Dublin" and "county of the city of Dublin" synonymous?—GREENE, B. Cannot the Court take judicial notice of what "the city of Dublin" is?]—We submit it cannot; where are the jurors to be summoned from? In *Pick v. Horan* (a), an objection of this kind was allowed, to an affidavit made in the city of Cork.—[GREENE, B. Possibly the omission might have interfered with a prosecution for perjury].—Some of the precedents have only a city in the margin, as "city of Bristol," but no precedent can be produced of a city only being named in the margin, where there is not a county named in the body of the declaration. Under the old practice, the statement of the venue in the margin was nothing; it aided, but it never hurt.

The venue in an action was stated in the margin of the summons and plaint as "city of Dublin." Held, that the venue was sufficiently stated.

F. Macdonogh and *W. A. Exham*, contra.

"City of Dublin" and "county of the city of Dublin" are synonymous terms, and the Court will take judicial notice of that admitted fact, because they are treated as synonymous in several Acts of Parliament. They are so treated in the Municipal Corporation Act, 3 & 4 Vic., c. 108, and several other Acts. The objection is of the most technical character, and ought not to be favoured.

C. R. Barry, in reply.

There is no precedent for such a summons and plaint as this. It is contrary to the form given in the Act, and the Court ought not

Appendix.

H. T. 1859. to aid those who wilfully depart from the forms prescribed by
Eschequer. the Act: *Wilkinson v. Sharland (a).*

COURTENAY

v.
BLAKE.

PIGOT, C. B.

We must give to every pleading a reasonable interpretation. It is necessary, according to the 10th and 62nd sections of the Common Law Procedure Act; and the form, that there shall be a venue in the margin. The form shows how the venue is to be stated; and when here we find the words "city of Dublin," in the margin, they mean this, "I, the plaintiff, describe the city of Dublin as my venue;" but the venue must be a county; and if there be such a thing as a city of Dublin, which is a county, "the city of Dublin" properly describes it. The Acts which have been referred to show that when they say "city of Dublin," they mean "county of the city." We are asked to hold that the plaintiff does not mean by "city of Dublin" what the Legislature, in the instances cited, says he does; and we are called upon to do that upon the mere technicality, the discussion of which has occupied the Court for so long. I think we ought to refuse the motion with costs.

GREENE, B.

I think we are bound, since the Common Law Procedure Act, to give every pleading a reasonable and fair interpretation. The Act says the venue shall be described in the margin, and accordingly the plaintiff here has in the margin "city of Dublin." The plain meaning of that is, "I select the venue in the margin as my venue." Is the city of Dublin a venue? Most clearly it is. The case would be different if the city of Dublin were no venue. For these reasons, I concur with my LORD CHIEF BARON.*

(a) 10 Exch. 724.

* RICHARDS, B., *absente.*

WALDRON *v.* PARROTT.

Jan. 27.

Where a plaintiff served notice of trial for the Consolidated Court, THIS was a motion that the notice of trial, served in this case on the 22nd of January, might be deemed a good notice of trial for the Sittings after Term, under the following circumstances. A garnished and the defendant made no objection to the notice, but appeared at the trial, and objected that the Judge had no jurisdiction to try the case, the Court (the last day for serving notice of trial having passed) allowed a notice of trial served on that day to stand for the Sittings after Term.

shee order had been obtained against the defendant ; and, as he disputed his liability to pay, the plaintiff (the judgment creditor) proceeded against him by a writ under the 66th section of the Common Law Procedure Act 1856. In this proceeding, notice of trial was served by the plaintiff, for the Consolidated Nisi Prius Court ; and upon the 22nd of January the case was called on in that Court. Counsel for the defendant attended, and objected that the Judge had no jurisdiction to try the case, having regard to the 237th section of the Common Law Procedure Act 1853. The plaintiff's Counsel therefore did not proceed with the case ; and, upon the same day, notice of trial was served for the After-sittings.

H. T. 1859.
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R. Armstrong, in support of the application.

The Court has jurisdiction, under the 103rd section of the Common Law Procedure Act 1853, to make the order sought for, and the case is one in which the jurisdiction should be exercised. The defendant by his conduct has led to the irregularity in the service of the notice ; for he acquiesced in it as a proper notice until the day of trial. It cannot be said that he is not prepared for trial, as Counsel attended for him in the Consolidated Court, and must have been fully instructed.

G. O. Malley, contra.

It is admitted now that the former notice of trial was irregular ; and therefore the case is as if there had been no notice served but the one now before the Court. No case can be cited in which the Court made such an order as that now sought.

Pigot, C. B.

The whole conduct of the defendant in this case has been productive of common mischief, involving the parties in useless and wanton expense. There may be some question whether or not, having regard to the 237th section of the Common Law Procedure Act 1853, there would have been any irregularity in trying this case in the Consolidated Court, if the defendant had not appeared at the trial ; but that the Court had jurisdiction, I do not entertain a doubt. If he had not appeared, there might have been an irregularity ; but still I would be disposed to say that the Court would bind him by his *laches* in not objecting to the notice served. It is not, however, necessary to express any opinion upon that point. What has been the conduct of the defendant here ? He allowed his adversary to incur all the expense of preparing for the trial ; he abstained from giving any notice, and appeared by Counsel at the trial. We have,

H. T. 1859.

Exchequer.

WALDRON

v.

PARROTT.

therefore, a party lying by, himself suggesting the difficulty, and appearing for no other purpose than to apprise the Judge that he did not intend to appear. We must infer that he entrapped his adversary to let pass the last day for serving notice of trial, by inducing him to believe that he would have a plenary trial in the Consolidated Court. He has accomplished one object; we must take care that, as he has laid a trap for his adversary, his adversary shall not fall into it, but that he shall himself incur that calamity. Upon that view of this case, I think it perfectly clear that we ought to exercise the jurisdiction which the Court possesses, and direct that the notice of trial already served should stand for the Sittings after Term.

GREENE, B.

I do not express any opinion as to whether or not the Judge had jurisdiction to try this case; but, on account of the total want of good faith, and great misconduct of the defendant, I quite concur with my LORD CHIEF BARON that the jurisdiction of the Court will be most properly exercised by acceding to this application.

MOYLAN v. HEALY.

Jan. 24, 27.

Where the plaintiff discontinues, the defendant will be entitled to costs, although the summons and plaint has not been filed.

This was a motion on the part of the defendant, that the Taxing-master might be directed to tax the defendant's costs in this cause, under the order of the 14th of December 1857; and that the said Taxing-master should tax the costs incurred by the defendant in preparing his defence to this action.

It appeared that the action was brought for an injury to a mare, the property of the plaintiff. The summons and plaint was served on the defendant in the month of October 1857, and he thereupon instructed his attorney to defend the action. Instructions were accordingly sent to Counsel to prepare a defence, and an order to plead several defences having been obtained, the defendant's attorney, on the 3rd of November, proceeded to file the defences. It then appeared that the plaintiff had not filed the original summons and plaint, although the time for filing same, so as to enforce a defence within the twelve days for appearing, had elapsed, and the officer refused to receive the defences. No step was taken by the plaintiff until the 14th of December 1857, when he obtained an order to discontinue the proceedings, on the usual terms of payment.

of costs. On the 17th of May 1858, the defendant's attorney served the costs of defence upon the plaintiff's attorney, and subsequently issued a summons to tax them. On the 24th of August, the taxation came on before the Taxing-master, and he decided that he had no power, under the circumstances, to tax any costs of defence as between party and party. The same view was taken by the other Taxing-master before whom the matter was brought. The defendant now appealed.

H. T. 1859.

Exchequer.

MOYLAN

v.

HEALY.

M. Morris, for the motion.

The decision of the Taxing-master proceeded on the principle that the defendant was entitled to no costs, because he had not filed his defence, which was owing to the default of the plaintiff. The order of the 14th of December 1857 allows the plaintiff to discontinue on payment of costs, and we are entitled to some costs under that order. It would be most unjust that the plaintiff should have it in his power to commence an action by serving a summons and plaint, put the defendant to expense in preparing for his defence, and then escape the payment of any costs by his own omission to file the writ.

W. Butler, contra.

The service of the summons and plaint is nothing without the filing; for the defendant is not bound to appear and take defence until then. The writ is not a record of the plaintiff's demand, or a declaration, until it is filed. At all events, the defendant is only entitled to £1. 1s. Od. costs, by analogy to the rule fixing the costs where the plaintiff has neglected to file the summons and plaint within two months from the service, and the defendant enters a rule to compel him to proceed, or pay such sum to the defendant as shall be occasioned by reason of his having been served with the summons and plaint (s. 38). The costs in that case have been fixed by the Taxing-masters at £1. 1s. Od.

GREENE, B.

That is where the defendant takes a step to put the plaintiff out of Court; but here the plaintiff has put himself out of Court. I do not see how that section can be applied to cases of discontinuance. Your argument must be that, though the section of the Common Law Procedure Act says that the plaintiff shall discontinue on payment of costs, the defendant, even in the case of a discontinuance, is entitled to no costs, unless the defence be filed. What is a defendant to do when he is served with a summons and

H. T. 1859. plaint? Surely he is justified in showing it to his attorney, and sending him to see it if it is filed; and you say now the plaintiff can withdraw from the suit without paying to the defendant one farthing of those costs.

MOYLAN
v.
HEALY.
Jan. 27.

The Court made the following order:—

That it be referred to the Taxing-officer to tax and certify the costs properly and necessarily incurred by the defendant in preparing for his defence in this action, and payable by the plaintiff, under the said order of the 14th of December 1857.

Jan. 31.

DUNNE v. LEWIS.

The Court will T. A. PURCELL moved, in this case, for an order that a writ of not permit a writ of *subpoena ad testificandum* might issue, to compel two persons named, and resident in London, to attend at the trial of this case at the approaching After-sittings. It appeared that one of the persons sought to be examined was a solicitor, and the other a cashier in a mercantile establishment. The affidavit upon which the motion was grounded stated that the evidence was material and necessary for the plaintiff's case, and could only be given by the persons sought to be examined.—[PIGOR, C. B. Why could not they be examined by a commission?]—There would not be time before the trial to obtain their evidence under a commission.—[PIGOR, C. B. This is a jurisdiction which should be exercised with caution, for otherwise the most oppressive and vexatious use might be made of it.—RICHARDS, B. I think your affidavit should state an application, and the result of that application.]

PIGOR, C. B.

The 17 & 18 Vic., c. 34, has given power to the Court to compel the personal attendance of witnesses resident in other parts of the United Kingdom; but the Courts have a discretion given to them, and that with a view of guarding against the inconvenience which the exercise of it might occasion. In the present case it might be highly inconvenient for these gentlemen—one a solicitor, and the other a cashier in a mercantile establishment—to be absent from their business in London. It must be shown, by affidavit, that this evidence cannot be procured by a commission, or otherwise than by their personal attendance.

GREENE, B., concurred.

H. T. 1859.
Exchequer.

Jan. 31.

NAGHTEN v. MIDLAND & WESTERN RAILWAY CO.

E. P. LEVINGE moved, on behalf of the defendants, for liberty to deliver to the plaintiff certain interrogatories, pursuant to the Common Law Procedure Act 1856, s. 56. The plaintiff, by his summons and plaint, claimed a sum of £80 as damages, for the loss, by the defendants, of certain articles of his personal luggage. The affidavit upon which the motion was grounded stated that the defendants were wholly ignorant of the time and place of the alleged loss, or any other circumstances attending same.

M'Kenna v. Chester & Holyhead Railway Co. (a) was cited in support of the motion.

The affidavit to ground a motion for liberty to deliver interrogatories should state the circumstances as to which discovery is sought.

The Court directed the motion to stand over until the affidavit was amended, by stating the particular circumstances as to which disclosure was sought.

The affidavit having been amended, by stating the circumstances upon which discovery was desired, and the questions proposed to be put, PIGOT, C. B., made the order.

Feb. 2.

(a) 8 Ir. Com. Law Rep., App., xxvi.

HERBERT v. BEYHAN.*

Jan. 20.

THE action in this case had been brought to recover an arrear of rent. The case was tried before the LORD CHIEF BARON, at the Sittings after Easter Term 1857. At the trial, the plaintiff sought to give evidence of the agreement under which it was alleged that the defendant held certain premises under the plaintiff, and which it appeared had not been stamped. That agreement was in the following terms:—

“ 1 Wilton-square, 1st of April 1850.

“ I propose to pay the Right Hon. Sidney Herbert the sum of fifty-five pounds for the field formerly in the possession of Mr. Fitz-

If a question arise at nisi prius, as to the liability of a document to stamp-duty, the Judge may reserve the question for the opinion of the Court, and order a conditional lodgment of the stamp-duty and penalty.

Such a lodgment is not a determination of right in favour of the Crown.

* The report of this case deals with only one of the points decided; its publication, upon the main question discussed, has been unavoidably delayed.

H. T. 1859. "patrick, and lately held by me, in Sandymount, containing
Eschequer. "about eleven Irish acres, for one year from the 25th day of March
 HERBERT "last, said rent to be paid quarterly, on the 25th day of June, the
 v.
 BEYHAN. "25th day of September, 25th of December and 25th of March
 "next; and I undertake to surrender the above named field at any
 "time that possession may be required of me.—MICHAEL BEYHAN."

The defendant objected to the admission of this instrument, being unstamped; and the plaintiff insisted that it did not require a stamp. He, however, lodged the penalty and the duty with the Registrar of the Court, pursuant to the 19 & 20 Vic., c. 113, ss. 34 and 35; the learned Judge reserving liberty for him to move for a return of the said duty and penalty, if the Court above should be of opinion that the document was admissible in evidence without a stamp.

C. H. Woodroffe now appeared to move accordingly.

Counsel was proceeding to argue that the document did not require a stamp, when—

Jebb, for the Commissioners of Inland Revenue, objected that the ruling of the Judge was final under the Common Law Procedure Act, and the question could not be reserved for the Court above; that the document had been given in evidence, and the penalty and duty lodged, and the Court was bound by that, and had no jurisdiction: *Siordet v. Kuczinski*(a), cited in *Ferg. Com. Law Pract.* p. 334.—[PENNEFATHER, B. The Judge admitted the proposal unstamped, but, lest he should be wrong, he allowed this money to be lodged, in order to guard the rights of the Crown.—GREENE, B. There has been no ruling here; but the question is reserved. The case referred to only decides that, if the Judge below decides the question, this decision is not to be reviewed.]

Woodroffe resumed, and argued that the agreement was not liable to stamp-duty.

Jebb, contra.

PIGOT, C. B.

The reason that I reserved this matter as I did at the trial was, that I thought it advisable, in consequence of some cases indistinctly occurring to my memory, that the matter should not be finally decided by me at Nisi Prius, but that it should receive the consideration of the Full Court; and the only way in which, under

the Act, I could do so was, by not receiving the money as a payment, but by allowing the party to lodge it with the Registrar, subject to the opinion which I and my Brethren here should entertain upon the matter. The money was not received or paid under the Act of Parliament. If the Registrar had received it as a payment under the Act, it never could be paid back; but he would be bound to pay it over to the Receiver of Stamps. Neither of the parties made any objection to my taking this course at the time, both being anxious to avoid payment of the money, and there being no party to represent or support the rights of the Crown. The matter appeared to me to be the subject of considerable doubt and difficulty; and the leaning of my mind would, at that time, have been to have received the instrument without a stamp; but, as there appeared to me to be important questions in the case, in which the Crown was especially interested, and, as my opinion was against the Crown, I wished to give an opportunity of having the case investigated. I do not mean to say this is a precedent, or a course permitted by the recent Act of Parliament, but it seems to me the only course by which an opportunity of having the case argued can be given to the Crown.

His Lordship then gave judgment at length upon the point of law, holding that the document was not liable to stamp-duty.

PENNEFATHER, B.

There have been two questions made in this case, upon each of which I think it necessary to say a few words. The first is, that the money having been lodged under the Act of Parliament, it is there to the use of the Crown, and the party has no right to get it back at all. Now, if it were a lodgment made pursuant to the provision in the Act of Parliament, which is a very beneficial provision, and one which ought to be favourably construed, it could not be paid out to the party under any circumstances; but that clause of the Act applies only to the case where the Judge is of opinion that the instrument requires a stamp. If he be of that opinion, then the party must pay the stamp-duty and a certain penalty, and that is paid to the Crown, and the party can never get it back again; but, in such a case, the Court must at the trial be of opinion that the instrument requires a stamp. Now, in this case, the leaning of the LORD CHIEF BARON was, that the instrument did not require a stamp; and he would have received it in evidence, without more, if he had decided the question; but, wishing to reserve the question for the Crown, in case he might be mistaken, he directed the parties to lodge this sum of money with the Registrar, not according to the Act of Parliament, but, with the

H. T. 1858.
Exchequer.
HERBERT
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H. T. 1859. *Ecclesiasticus.* consent of the parties, and to be paid to the Crown, in case this Court should be of opinion that the instrument did require a stamp. It is plain that this was not paid under the authority of the Act of Parliament, which only could come into operation when the Judge at the trial thinks the document requires a stamp. It was merely lodged *ex abundanti cautela*, to await the confirmatory decision of this Court.

Upon the other question, his Lordship concurred with the Lord CHIEF BARON.

RICHARDS, B.

With respect to the preliminary question, as it may be called, I have no difficulty whatever; I arrive quite at the same conclusion as my Lord CHIEF BARON.

GREENE, B.

On the first question, I have no doubt whatever; and I have to express my perfect concurrence in the views of my Brethren, with respect to the course taken by my LORD CHIEF BARON. It is quite impossible to hold that the lodging of this money in Court was a payment over to the officer as a trustee for the Crown; and I therefore feel no difficulty upon this part of the case.

Upon the other point in the case, his Lordship differed from the other Members of the Court, and held that the document required a stamp.

H. T. 1859.
Eschequer.

Jan. 27.

SHEPPERD v. BEAMISH.

In this case the defendant had obtained the usual order to compel the plaintiffs, who were resident out of the jurisdiction, to give security for costs. That order was obtained upon an affidavit depositing to facts from which, if true, the existence of a defence upon the merits might be inferred. The present application was to set aside that order, upon the ground that there was no defence upon the merits to the action ; and several affidavits were made in support of the motion, stating certain proceedings in the Insolvent Court, and other matters, which were relied upon as showing that the defendant had no meritorious defence to the action.

The affidavit to ground a motion for security for costs in this Court must allege some facts from which the existence of a defence may be inferred ; but the Court will not hear any evidence to test the truth of such an allegation.

T. Harris, in support of the application.

E. M. Kelly, contra, was not called upon.

PIGOT, C. B.

We do not require to hear any opposition to this motion. The course taken here is an abuse of the practice of this Court, according to which it is considered necessary that, in the affidavit grounding a motion for security for costs, the defendant should, besides the general allegation that he has a defence on the merits, show something which may satisfy the Court that such a defence exists—not that he should state evidence, but merely some matter to satisfy the Court that the allegation he makes is true. But it was never held or suggested by this Court that we would allow that matter to be contradicted or contested by other affidavits. In the present case we have five or six affidavits depositing to certain proceedings in the Insolvent Court, upon which we are called on to say that there is no defence upon the merits. Now, if this were true, we should have to stay the proceedings in this action, which we clearly are not at liberty to do. This is an instance of an application of a most oppressive nature. We shall first refuse this motion, with costs, letting the rule stand, founded as it was on an affidavit *prima facie* disclosing a case of merits ; and next, we shall direct that the costs be paid by the plaintiff's attorney.

GREENE, B.

The rule made by this Court is founded on the wording of the Act of Parliament, which directs that no order to give security for

H. T. 1859. costs shall be made, unless upon, not an affidavit, but a *satisfactory* affidavit, that the defendant has a defence upon the merits. Now, what is a *satisfactory* affidavit? It is not an affidavit stating a case which the Court must be satisfied will succeed at the trial; but if the mere general allegation "that the defendant has a defence upon the merits" amount to a *satisfactory* affidavit, it appeared to us that there would be nothing before the Court upon which it could exercise any judgment at all; and that the word "*satisfactory*" would become altogether useless: but, on the other hand, it is a mistake to assume that the word "*satisfactory*" means that the affidavit should satisfy the Court that the defendant's case is well founded in point of law or fact: what this Court says is, "Show us on the face of your affidavit what is the defence you set up." It is right that the rule of this Court, differing as it does from that of the other Courts, should be understood. It says, "Put us in possession of "something like a fact or a defence which will enable us to say that "you have something to dispute with your adversary. Let us understand that you do not take upon yourself to say that you have "a defence in the abstract, but tell us something which is sufficient "to show us that you have a defence to the action." I never would suffer a matter of that kind to be met by the other side on affidavits. It is entirely a question between the party making the application and the Court. I therefore think the affidavits made here are unwarrantably put on the files of this Court. The defendant has no means of making the plaintiff pay the costs if he fails in the action, and comes forward to stay him until he gives security; and for that he merely has to make a *prima facie* case for the satisfaction of the Court. I therefore quite concur with my LORD CHIEF BARON in the mode which he has adopted of notifying his disapprobation of this proceeding.

PIGOT, C. B.

I may mention that, in *Warrington v. Leake* (*a*), it is distinctly ruled that when facts are brought forward in the affidavit by the defendant, it is not competent to the opposite party to answer those facts by a counter-affidavit.

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Queen's Bench

M'ENIRY

v.

THE WATERFORD AND LIMERICK RAILWAY CO.*

(Queen's Bench.)

Jan. 28.

MOTION for leave to withdraw the demurrer to the defence in this case, and to take issue on such defence, upon the terms of paying the costs of the argument on the demurrer, and of the judgment thereon, when taxed. Judgment on the demurrer was marked on the 20th of June 1858.† The plaintiff, who was a labourer, by his affidavit, made a case of negligence and incompetency against a servant of the Company, in consequence of which the train ran against and injured the plaintiff; and he alleged that for such neglect, in connection with the accident, the servant was prosecuted by the defendants at the Kilkenny Summer Assizes of 1857, and sentenced to imprisonment, with hard labour. He also alleged that his poverty, which was caused by the injuries which he had sustained, was the cause of his not having applied to the Court at an earlier period.

The defendants, in an affidavit by their traffic manager, relied upon the length of time which the plaintiff had allowed to elapse since judgment had been marked, and alleged that much injustice would be done if they were now obliged to go to trial, as three material and important witnesses, who were named, had left the defendants' employment, and were out of the jurisdiction, and as the attendance of other witnesses, who were also named, would be attended with serious inconvenience to the defendants. It was also alleged that the plaintiff, after completely recovering from the effects of the accident, had been again employed by the defendants until the 22nd of August 1857, when he was dismissed from their employment, for idleness, and not for physical incapacity.

The plaintiff, by an affidavit in reply, stated whereabouts in England the three witnesses alleged by the defendants to be material witnesses, and to be out of the jurisdiction, were to be found, and also stated that all the other witnesses were resident within the jurisdiction. The plaintiff also relied on a promise which had been made

After a demurrer to a defence had been argued and disallowed, and judgment marked, the Court refused a motion by the plaintiff for leave to set aside the judgment for the defendant on the demurrer, and to take issue in fact on the defence, on the terms of paying the costs of such demurrer and judgment.

* Coram CRAMPTON, PERRIN and O'BRIEN, JJ.

† Note.—The pleadings in this case are fully set out in the report of the argument on demurrer (8 Ir. Com. Law Rep. 312).

H. T. 1859. to him by the defendants, to give him permanent employment, of a
Queen's Bench less laborious nature than his former employment.

M'ENIBY

v.
 w. & L.
 RAILWAY. *D. Lynch* (with him *F. Smyth*), for the motion, relied upon the
 merits disclosed by the affidavits.

J. E. Walsh and *Tandy*, contra, relied on the lapse of time since
 the demurrer had been argued, and upon the absence of material
 witnesses, whereby the defendants would be now unable to defend
 the action.

D. Lynch replied.

CRAMPTON. J.

The lapse of time which has occurred is a very strong circumstance against the possibility of our granting this motion, by which we are called upon to do great prejudice to the defendants. We cannot enter into the conflicting swearing of the affidavits, on a motion like the present; but it must be admitted that the defendants would be placed in a position of great disadvantage if the Court were to grant this motion, and to allow the plaintiff to try back and to proceed as if he had not demurred to the defence, but had taken issue on the facts averred by it. This motion is contrary to the practice of the Court—a practice founded upon a wise maxim in the administration of justice, *interest recipublicæ ut sit finis litium*. If the defendants have promised the plaintiff in the manner alleged in his affidavit, the refusal of this motion will not prejudice him in the slightest degree in enforcing his rights under that promise.

Motion refused.

THE QUEEN v. JOSEPH MAGILL.*

Jan. 29.

The Court will grant a BREWSTER, on the 17th of November last, obtained a conditional order for a writ of certiorari, directed to the Justices of Assize, and remove an indictment for obstructing a public highway, from the Clerk of the Crown for the county of Antrim, to remove into the Court of Queen's Bench a bill of indictment, found against the defendant at the Summer Assizes of 1858, for the county of Antrim, for obstructing, by the erection of a gate-house and en- appearing to be necessary to the ends of justice that there should be a view of the locus in quo.

* Coram LEPROY, C. J., PERRIN and O'BRIEN, JJ.

trance-gates, certain highways, footways and driftways leading into or over certain lands part of the Cave-hill near Belfast in said county; on the grounds that the trial of the issue in the indictment would involve difficult, novel and important questions of law; that the indictment being preferred at the instance of certain persons, inhabitants of the said county, calling themselves an "Association for the protection of public rights of way in and around Belfast," and all or some of whom were liable and likely to serve as jurors, were prejudicially affected against the defendant, by reason of certain newspaper publications in reference to the offence charged in the indictment, and the invasion of public rights of way hitherto enjoyed by the inhabitants of said county.

H. T. 1859.
Queen's Bench
 THE QUEEN
 v.
 MAGILL.

Brewster (with him *McGowan*) now moved that the conditional order be made absolute; and in addition to the grounds set out in the conditional order, which were verified by the affidavit of the defendant, urged that the real controversy in the case was, whether the inhabitants of Belfast and the neighbourhood had a right to go over any part of the Cave-hill, of which the highway obstructed by the defendant was a portion? That the case was not substantially in its nature the subject of a criminal prosecution, but partook much more of the nature of a civil action. He also argued that this was not an application to change the venue, but merely to have the indictment removed into this Court by certiorari; in that event the case could be tried by a special jury. That the right in question being both a public right and a private privilege, a very important and difficult question of law would thus arise, and that the removal of the case into this Court by certiorari would enable the parties to have it tried at Nisi Prius, and to have the opinion of the Court above upon the question of law. A view of the premises was necessary, and that could not be had in a criminal proceeding.

Macdonogh and *Joy* (with them *Harrison*) opposed the motion, and relied on the affidavit of the solicitor for the said association, negativing the allegations of the defendant as to the newspaper publications influencing the minds of the jurors, and stating that several material witnesses for the prosecution were aged persons, and that it would be most difficult, if not actually impracticable, to examine them if the trial were not had in Belfast, and that it would be necessary to have a view of the premises in question. They also contended that where the indictment was sought to be removed, on the ground that difficult points of law may arise on the trial, it must be specified what those points are: *Rex v. Harrison* (*a*);

H. T. 1859. *Regina v. Greene* (*a*); *Rex v. Jowl* (*b*). Upon the point that a certiorari is not granted on slight grounds, they cited *Rex v. Fellows* (*c*). They also argued that, by the 11 & 12 Vic., c. 78, the Judge may reserve any question of law that arises at the trial, for the consideration of the Court of Criminal Appeal: *Rex v. Templar* (*d*). That the newspaper publications, having taken place two years ago, could not influence the minds of the jurors: *Rex v. Mead* (*e*). That the necessity for a special jury is not ground for granting a certiorari: *Regina v. Greene* (*f*). That the necessity for a view of the *locus in quo* may be a good ground for a certiorari: *Corner's Crown Pract.*, p. 54, citing *Rex v. Tradgely* (*g*).

LEFROY, C. J.

The difficulty which we at present feel arises from the authority of the case which has decided that the necessity for a special jury is not alone a sufficient ground for granting a certiorari. In this case, however, we are not limited to that ground, there being another which, although not made as apparent as it might have been, yet is one which, as well from the nature of the case as from the statement of the party opposing this motion, is such as will authorise us to grant the certiorari—I mean the necessity of a view. Now, that there cannot be a view unless we remove the case by certiorari, is a ground which takes the present case out of the authority of the cases to which I have referred. Although we are of opinion that the difficulty of the questions of law has not been made out, so as to authorise us to grant the certiorari upon that ground alone, yet, it being apparent that it is absolutely necessary to the ends of justice that there should be a view, upon that ground we grant the certiorari.

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|--------------------------------------|---------------------------------|
| (<i>a</i>) 1 Wil. Wol. & Hodg. 35. | (<i>b</i>) 2 Har. & Wol. 375. |
| (<i>c</i>) 1 Har. & Wol. 648. | (<i>d</i>) 1 N. & P. 91. |
| (<i>e</i>) 3 Dow. & Ry. 301. | (<i>f</i>) <i>Supra.</i> |
| (<i>g</i>) 1 Sess. Cas. 180. | |

H. T. 1859.
Queen's Bench

Jan. 31.

SOMERVILLE and others v. SHEALS.*

MOTION to set aside an equitable defence to an action for an additional rent.—The plaint in the first count claimed £10 for one year's annual rent. Second count.—That before the commencement of this suit, on the 30th of September 1848, in consideration that the defendant, at his request, had become, and then was, tenant to the plaintiffs of certain lands and premises, with the appurtenances, of the plaintiffs, upon and subject to certain terms (amongst others), to wit, that he, the defendant, would not break up, or plough or dig up any part or portion of the said lands and premises, without permission in writing first had and obtained from the said plaintiffs, or either of them; and in case the said defendant should break up, plough or dig up any part or portion of the said lands and premises, without having first obtained such permission as aforesaid, then the said defendant bound himself to pay the additional rent of £10 per acre, or portion of an acre so broken up, ploughed or dug up without such permission as aforesaid: the said defendant undertook and promised the said plaintiffs that he would not break up, plough or dig up any part or portion of the said lands and premises, without such permission in writing first had and obtained from the plaintiffs.

Averment.—That the defendant became and was, and still was, tenant of the said lands and premises, with the appurtenances, upon the terms of the said agreement.

And that during the continuance of the said tenancy, and whilst the said defendant was so possessed of the said lands and premises, with the appurtenances, the said defendant did break up, plough and dig up two acres and three rods of lands belonging to the said premises, contrary to his said last-mentioned agreement and promise, whereby the further sum of £30 had accrued due, and still was owing, from the said defendant to the said plaintiffs, the particulars whereof were indorsed.

The defendant, in answer to the first count of the plaint, paid £10 into Court; and to the second count pleaded, by way of equitable defence, that the agreement mentioned in the second count was entered into on the 30th of September 1848, as therein alleged, and was expressed to be between the plaintiffs in this action, therein described as trustees of one G. W. Lambert, of the one part, and the

To an action on an agreement, not under seal, for a penal rent for ploughing up 2a. 3r. 7p. of land, the defendant pleaded, by way of equitable defence, that the agreement was made between the plaintiffs, trustees for A, and the defendant, and was prepared by B, who was the land agent of the plaintiffs, and their attorney in the present action. The defendant then averred that A, the *ceutui que trust*, who was beneficially entitled to the land, and B, had seen the defendant break up the lands in due course of husbandry, and had approved of, and acquiesced in, such breaking up of the land.—*Held*, that this defence was embarrassing, and not an answer to the action.

* Coram LEFROY, C. J., PERBIS and O'BRIEN, JJ.

H. T. 1859. defendant, of the other part. That the said G. W. Lambert was the owner of the said lands and premises mentioned in the said agreement, and the party beneficially interested in them. That the said agreement was drawn up, prepared, and sent to the defendant by W. C. Cornwall, who at the time was, and still was, the agent and manager of the said lands of the plaintiffs, the trustees before mentioned, and of G. W. Lambert, the owner as aforesaid, and which W. C. Cornwall was also the attorney of the plaintiffs in the present action. That on many and divers times during the continuance of the said tenancy, to wit, from the said 30th of September 1848, and up to the commencement of this action, the said G. W. Lambert, the owner as aforesaid, and the said W. C. Cornwall, said land agent and attorney of the plaintiffs as aforesaid, had repeatedly and respectively seen the defendant break up, plough and dig up the said lands and premises aforesaid, in due course of husbandry and cultivation, and never objected to defendant so breaking up, ploughing and digging up said lands, but, on the contrary, highly approved of and complimented defendant on the same, and encouraged him to persevere therein; and in consequence of such encouragement acquiescence and approval, defendant did so persevere and continue aforesaid.

E. Johnstone (with him *Maedonogh*) moved to set aside the defence to the second count, as embarrassing, and as not setting forth good and sufficient equitable grounds as an answer to the action of the plaintiffs, and relied upon the absence of any averment of consent on the part of the plaintiffs, before the breach of the agreement complained of, or of a waiver or acquiescence on their part after the breach; and also upon the absence of an averment of fraudulent acquiescence with a view to the present action; and he cited *Gerrard v. O'Reilly* (a). He also objected that the defence, as pleaded amounted to matter of evidence.

G. Battersby and *Ralph*, contra, contended that the defence would be a good answer, in Equity, to the demand of the additional rent, which was, in fact, a penal rent; and cited *Richardson v. Evans* (b); *Harryman v. Collins* (c); *Short v. Taylor* (d); *Dumpor's case* (e).

Maedonogh was not called upon by the Court to reply.

(a) 2 Con. & L. 165.

(b) 3 Madd. 218.

(c) 18 Beav. 11.

(d) 3 Eq. Cas. Abr. 522, pl. 3.

(e) 4 Rep. 120 a, note, Thomas' ed.

LEFROY, C. J.

We have laid down the rule in this Court, not long since, that an equitable defence, under the Common Law Procedure Act, must disclose such facts as would entitle the defendant to a perpetual injunction in a Court of Equity, which would put an end to all questions depending between the parties on the matter, and would leave nothing further to be settled between them; but this defence is pleaded in a manner calculated to leave the point in question unsettled between the parties. The plaintiff complains that 2A. 3R. of the land have been broken up, contrary to agreement, and the defendant alleges that the attorney for the plaintiffs (who is also the agent and manager of the lands for the plaintiffs) prepared the agreement, for a breach of which this action is brought; and he then pleads a special defence of acquiescence by one G. W. Lambert, for whom the plaintiffs are stated to be trustees, and also by the attorney for the plaintiffs, in the breaking up of the lands, in due course of husbandry. The defence does not traverse expressly the breaking up of the 2A. 3R., which is the particular injury complained of, and it is, therefore, objectionable and calculated to embarrass. But, even in a Court of Equity, this plea would disclose no defence to the action; it avers that the agreement was made between the plaintiffs, as trustees for G. W. Lambert and the defendant, but it does not allege any acquiescence by the plaintiffs, who, probably being themselves restricted in their power to let the lands, could not have so acquiesced; nor does it aver that the defendant was fraudulently led into this breach of the agreement which is complained of. We must, therefore, set aside this defence.

PERRIN and O'BRIEN, JJ., concurred.

Motion granted.

NOTE.—Upon the point of acquiescence, see *Perry v. Davis* (3 C. B., N. S., 760).

KNIGHT v. LYNCH.*

Jan. 31.

HEMPHILL applied, without notice, for leave to plead and demur.

This was an action of slander: the plaint contained two counts,

the demurrer, if successful, would be to put a stop to the action altogether, the parties being put under terms to argue the demurrer first.

* *Cores LEFROY, C. J., PERRIN and O'BRIEN, J.*

H. T. 1859.
Queen's Bench
 SOMERVILLE
 v.
 SHEALS.

H. T. 1859. and averred the same special damage in each. The demurrer was
Queen's Bench
 taken to both counts.

KNIGHT

v.
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LEFROY, C. J.

As the result of the demurrer, if allowed, will be to put a stop to the action altogether, this is a case in which we ought to exercise the discretion vested in us by the Common Law Procedure Act, 1853 (a), the parties being put under terms to argue the demurrer first.

Motion granted.

(a) Sec. 59.

GROME v. BLAKE.*

(*Consolidated Chamber.*)

Feb. 19.

An application MOTION, on the part of the defendant, for an order to strike a special jury, under the old system, upon the ground, as appeared from the affidavit of the defendant's attorney, that the plaintiff's attorney was the Returning-officer of the Sheriff for the county of Galway, in which the venue was laid.

Harty, for the motion, cited *Fleming v. Taylor* (a) and *Dickson v. Denroche* (b).

O'BRIEN, J.

Have you given notice of this application? It is the practice of all the Courts to require notice of such an application as the present to be given. You must, therefore, serve the plaintiff with notice.

(a) 3 Ir. Com. Law Rep. 75. (b) 3 Ir. Com. Law Rep. 24.

* *Cotram* O'BRIEN, J.

1859.
Censol. Cham.

HENNESSY v. MORGAN.*

Feb. 25.

SLANDER of the plaintiff in his trade and business, as a butter buyer and shopkeeper. The plaintiff set forth the slanderous words, with inuendoes, and averred special damage. The defendant, in addition to other pleas, pleaded, as a further defence to the first, second and fifth of the counts in the plaint respectively (and to avoid prolixity and repetition, craved that such defence might be taken as a distinct defence to each of the said counts and the words therein respectively mentioned), that the said several grievances, in the said counts respectively mentioned, were committed at one and the same time, and that the butter in the said counts respectively mentioned was one and the same butter; and averred that, before the said time, butter of the defendant (other than that mentioned in said counts respectively) had been sold by weight to the plaintiff at his said shop, in the course of his said trade, and that the defendant, before and at the said time, *suspected and believed* that the plaintiff had been guilty of the several frauds in the said counts respectively mentioned, and had, in the exercise of his trade, wilfully used improper and fraudulent weights, &c.; and averred that, *in consequence of such belief*, the defendant, *believing said supposed several frauds of the plaintiff to be* (as in fact if committed they were) *punishable at law*, at the said time went into said shop, and then and there, for the reason aforesaid, and with the *bond fide* intention and for the purpose of having said several frauds inquired into, detected and exposed, and the plaintiff brought to justice for the same, then and there charged the plaintiff with the commission of the said frauds, and for the purpose of so charging the plaintiff, and for the purpose of having *said suspected frauds* duly inquired into, detected and exposed, and the plaintiff brought to justice for the same, then and there spoke and published the words in the said counts respectively mentioned. The defendant also averred that he spoke the said words *bond fide*, believing them to be true, and without malice, and that he did not, on the occasion aforesaid, or in speaking the said words, use language stronger than was necessary, nor did he speak or publish the said words before or in the presence of more persons than was necessary, which were the matters complained of in the said first, second and fifth counts respectively.

To an action for slander, the defendant pleaded that, suspecting and believing that the plaintiff had, on previous occasions, and on the occasion in question, been guilty of fraud in the course of his trade, and had thereby cheated the defendant; and that the defendant, for the purpose of having the fraud inquired into and exposed, spoke the words complained of, *bond fide*, believing them to be true, and without malice, and did not, in speaking the said words, use language stronger than was necessary, nor did he speak or publish the words in the presence of more persons than necessary.

This defence was set aside as embarrassing, because it did not set forth the facts which the defendant relied upon as the grounds for his belief.

* *Coram HAYES, J.*

1859.
Consol. Chanc.
HENNESSY
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MORGAN.

H. E. Chatterton moved to set aside this defence, as embarrassing. He argued that no facts were set out in the defence, as constituting any ground from which it could be ascertained whether the suspicion and belief upon which the plaintiff relied were well founded, with the exception of the single fact that butter of the defendant had been previously sold by weight to the plaintiff at his shop; and that, to succeed upon this defence, it would only be necessary for the defendant to prove the existence in his own mind of the belief and suspicion which he alleged. He instanced, as an analogy, the justification of a trespass by malicious prosecution, and cited *Mure v. Kaye* (a); *West v. Baxendale* (b); *Praeger v. Shaw* (c); and cited and distinguished *Padmore v. Lawrence* (d), on the ground that the plea in that case was merely not guilty.

J. E. Walsh, contra, argued that the defence which was objected to was founded upon the case of *Padmore v. Lawrence*, and that the object of the motion was to require a detailed statement of the defendant's evidence to be set forth on the plea; the result of which would be (as the *bona fides* of defendant's belief was a question for the jury), that, if the defendant failed in the proof of some unimportant item of the facts which he set forth, the verdict might be against him, although his *bona fides* was substantially proved. He also argued that the objection, if a valid one, should be taken by demurrer, as was done in *Praeger v. Shaw*, in which case he remarked that *Custis v. Sandford* (e), and *Padmore v. Lawrence*, had not been cited.

H. E. Chatterton, was not called upon to reply.

HAYES, J.

The defence has not gone far enough; it ought to have been more precise, without at the same time infringing the rules of pleading. The plaintiff has a right to have the facts upon which the defendant relies as the grounds of his belief concisely set forth upon the pleadings. This defence is in the nature of a privileged communication; and the substance of it is, that the defendant suspected the plaintiff to have been guilty of several malpractices: it is not then unreasonable that the defendant should shortly state the facts upon which he relies, in order that the plaintiff may go to trial prepared to show whether there were any grounds for the defendant's suspicions. There was a case in the Common Pleas,

(a) 4 Taunt. 34.

(b) 9 C. B. 141.

(c) 4 Ir. Com. Law Rep. 660.

(d) 11 Ad. & El. 380.

(e) 4 Ir. Com. Law Rep. 197.

Owens v. Roberts (a), very much in point, in which the facts tending to prove the *bona fides* were set out on the pleadings. This defence merely states the result in the defendant's own mind, from facts not disclosed. It must be set aside with costs.

1859.
Consol. Cham.
HENNESSY
v.
MORGAN.

(a) 6 Ir. Com. Law Rep. 386.

IRWIN v. LATTIMER.*

MOTION for a view jury.

Feb. 25.

The officer of the Court asked had notice been given of the motion?

In all the Courts the application for a view jury must be on notice.

J. C. Lowry, for the motion, answered in the negative.

HAYES, J.

It is the practice of all the Courts that a motion such as this must be on notice.

* *Coram HAYES, J.*

GLYNN v. W. S. DILLON and CATHERINE DILLON.*

Feb. 25.

THE summons and plaint in the first paragraph stated that, before the commission of the grievances thereafter mentioned, the plaintiff had been for nine years previously, and then was, a domestic servant, and, as such, during all that time had been so employed by

The summons and plaint stated that the plaintiff, a domestic servant, had obtained, from the per-

sons by whom she had been employed, written certificates, commonly called discharges, and that while she was so possessed of such certificates, the defendants hired her to act as such domestic servant, and required her to deliver to them said certificates on entering into said employment, to be retained in their possession while the plaintiff remained in said employment, and which the plaintiff did so deliver to the defendants; and that while said certificates were in the possession of the defendants aforesaid, the defendant C. Dillon wrote upon each of said certificates, before re-delivering the same to the plaintiff, the following words:—" Margaret Glynn lived with me for one fortnight; any lady requiring her character should apply to me.—C. D.;" and that said words were maliciously, wrongfully and unjustly written on said certificates, to signify that the plaintiff had been dismissed from the defendants' employment for some impropriety, by reason whereof the said certificates became defaced, damaged and wholly useless to the plaintiff; and the plaintiff had been prevented from obtaining employment as a domestic servant; and several persons, solely by reason of the premises, had refused to employ her, whereby she was deprived of the means of her livelihood.

An application to set aside this summons and plaint as embarrassing refused, it being open to the defendants to traverse the acts complained of, or to demur.

* *Coram HAYES, J.*

1859.
Consol. Chan.
 GLYNN
 v.
 DILLON.

various persons (naming them), and had obtained from those persons (naming them) written certificates, commonly called discharges, testifying that the plaintiff had conducted herself honestly, soberly, quietly and attentively to her business, and with good conduct during all the time she was so employed by the said persons (naming them), and that she was fully qualified and skilled in her said occupation of a domestic servant, and well fitted in all respects to fulfil and discharge the duties of her said calling of domestic servant; and that while she was so possessed of said certificates, and before the committing of the grievances thereafter mentioned, the defendant W. S. Dillon, and the defendant his wife, Catherine Dillon, on his behalf, employed and hired the plaintiff to act as such domestic servant in his house and in his employment and service, whereupon the defendant W. S. Dillon, and the defendant his said wife, for and on his behalf, required the plaintiff to deliver to them said certificates on entering into said employment and service, to be retained in their possession while the plaintiff remained in said employment and service, and which was usual and customary in such cases, and which said certificates the plaintiff did so deliver to the defendants before entering upon said employment and service, and before she was admitted into the house of the said defendant W. S. Dillon; and the plaintiff averred that the defendants were induced by the good character of the plaintiff, contained in the said certificates, to employ and hire her as such domestic servant; and that afterwards, and while said certificates were in the possession of the defendants, as aforesaid, the defendant C. Dillon maliciously, wrongfully and unjustly, and intending to injure and aggrieve the plaintiff, did write in ink, in and upon each and every of said certificates, before the defendant re-delivered the same to the plaintiff, as thereafter mentioned, on her quitting the said employment and service of the said W. S. Dillon, which she afterwards did, the following words and figures, that is to say:—" Margaret Glynn lived with me for one fortnight" (meaning that the plaintiff lived with the defendant C. Dillon for one fortnight); "any lady requiring her character should apply to me.—Catherine Dillon" (meaning the defendant C. Dillon), "34 Wellington-road, January 21st 1859:" and that, on quitting said employment and service, the defendants then delivered the said certificates to the plaintiff, with the said words and figures so written thereon as aforesaid, and that said words and figures were maliciously, wrongfully and unjustly, and intending to injure and aggrieve the plaintiff, so written on said certificates, to signify that the plaintiff had been dismissed from the employment and service of the said W. S. Dillon for some

impropriety, and as being a person unfit to retain the same ; by reason whereof the said certificates became and were, and continued, defaced, damaged, disfigured and wholly useless to the plaintiff, and the plaintiff had been and was prevented from obtaining employment as a domestic servant, by reason of her said certificates being so defaced, damaged and disfigured, and which had thereby become useless to her ; and several persons (naming them), solely by reason of the premises, refused to employ the plaintiff, whereby she had been since deprived of the means of her livelihood, and had lost great gains.

The second paragraph differed from the first, merely in charging that the defendant W. S. Dillon, maliciously, wrongfully and unjustly, and intending to injure and aggrieve the plaintiff, advised and suggested to his said wife to write in and upon said certificates the words and figures thereafter mentioned ; and that the defendant C. Dillon, in pursuance of said advice and suggestion, did maliciously, wrongfully and unjustly, and intending to injure and aggrieve the plaintiff, write, &c.

The third and fourth paragraphs merely differed from the two preceding paragraphs in omitting the charge of malice, and charged that the acts complained of were done wrongfully and unjustly, &c.

R. Armstrong (with him *J. Leahy*) applied to set aside the several paragraphs of the summons and plaint, as being embarrassing ; and it being impossible for the defendants to know whether the action was in trespass, on the case, for libel or for a conspiracy.

H. Fitzgibbon, contra, argued that there was no embarrassment in the case ; that it could not be an action of trespass, because, as Lord Abinger said, in *Taylor v. Rowan* (*a*), "I never yet heard of "an action of trespass being brought for an injury done to a chattel "while it was not in the possession of the plaintiff." Nor could it be libel, as, to constitute libel, publication was absolutely necessary ; and in the present case there was no publication. It was plainly an action on the case, for maliciously defacing the plaintiff's discharges, and thereby depriving her of the means of obtaining her livelihood. As to the point of conspiracy, he argued that an action would not lie for a conspiracy, but would lie for the legal damage resulting therefrom : *Cottrell v. Jones* (*b*). In support of the summons and plaint, he cited *Rogers v. Macnamara* (*c*) ; and that an averment of malice was not necessary : *Hurrell v. Ellis* (*d*).

(*a*) 7 C. & P. 70, 74.

(*b*) 11 C. B. 713 ; S. C., 16 Jur. 88 ; 21 Law Jour., C. P., 2.
(*c*) 14 C. B. 27 ; S. C., 16 Jur. 1166. (*d*) 2 C. B. 295, 299.

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DILLON.**HAYES, J.**

It appears to me that I ought not set aside this plaint as embarrassing. I do not look upon this as being an action of libel; nor indeed is any such case put forward or stated on the face of the plaint. What the plaintiff complains of is, that the defendants have done an act altogether unjustifiable; namely, that, having got the plaintiff's discharges from her, as is usual in such cases, they wrote upon them what they had no right to do, and thereby the damage complained of has resulted. The injury is single, the act complained of being simply that the defendants injured the plaintiff's discharges, thereby doing her manifest wrong. This might be met in many ways, as, for instance, by a denial of the act complained of.

The case in the Common Pleas in England, cited by Mr. Fitzgibbon, assists this case materially, and is, in my opinion, very much in point. If the defendants consider the action not maintainable, their better course is to demur; but I do not see any reason to set aside this plaint as embarrassing.

Motion refused.

1859.
Consol. Cham.

WALKER v. KEEGAN.*

March 4.

G. FITZGIBBON (with him *J. F. Walker*), on behalf of the plaintiff, applied that a witness in the cause might be examined before the Master of the Court of Exchequer, at the residence of the witness, the state of his health being such as not to admit of his attending at Dundalk, where the case was to be tried at the ensuing Assizes. Counsel relied upon the affidavit of the plaintiff's attorney, which stated that the witness was a material one for the plaintiff, and that, from the state of his health, he would be unable to attend at the Assizes at Dundalk, but was willing to be examined at his own house. He also relied on the certificate of a surgeon, which stated that the witness had recently suffered from a severe and dangerous inflammation of the lungs, and that, in the surgeon's opinion, he could not attend as a witness at Dundalk without danger to his life. This certificate, as to the handwriting and signature of the surgeon, was verified by an affidavit of the plaintiff's attorney. *Smith v. The Earl of Howth* (a), decided in the Common Pleas, on the 8th of February 1859, was cited in support of the application.

Upon an application to examine a witness, who is unable from illness to attend at the trial of the cause, the certificate of a surgeon whose handwriting and signature are verified by affidavit is sufficient.

C. Shaw resisted the application, on the ground that the mere certificate of a surgeon was not sufficient, and that an affidavit was indispensable: *Lush's Prac.*, 2nd ed., p. 358; *Abraham v. Newton* (b); same case, *sub nom. Abraham v. Norton* (c); *Pond v. Dimes* (d); *Davis v. Lowndes* (e); *Burke v. Sutton* (f); *Boyce v. Rosborough* (g).

FITZGERALD, B., made the order as sought.

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| (a) Not reported. | (b) 8 Bing. 274. |
| (c) 1 Moo. & Sc. 384. | (d) 3 Moo. & Sc. 161. |
| (e) 7 Dowl. Pr. Cas. 101; S. C., 2 Jur. 945. | |
| (f) 6 Ir. Com. Law Rep. 270. | (g) 7 Ir. Com. Law Rep. 17. |

* *Coram FITZGERALD, B.*

H. T. 1859.
Queen's Bench.

KENYON v. TAYLEUR.*

Jan. 27.

(*Queen's Bench.*)

To an action for the breach of a contract for the sale and delivery of coals, the defendant, in addition to a general traverse of the contract sued on, pleaded two special defences, in which he set forth an additional term by which the contract was qualified, and which the plaintiff had omitted to state, and averred that, upon breach by the plaintiff of the contract so qualified, the defendant had, as he lawfully might, rescinded the contract.

Held, that the special defences were properly pleaded, and were not embarrassing.

Per CRAMPTON, J.— Such special defences are unnecessary, inasmuch as evidence of the special matter may be given under the traverse of the contract; but the defendant

nevertheless has the option, instead of relying solely on the traverse, to apprise the plaintiff of his real defence, by specially setting it forth upon the record.

MOTION to set aside defences as embarrassing.

The summons and plaint stated that, by a contract entered into between the plaintiff and defendant, on the 5th of March 1858, the defendant agreed to sell, and did sell, to the plaintiff 3000 tons of the defendant's best Arley Mine four-foot coal, at eight shillings per ton, shipped free on board, in the North Docks, Liverpool, the 3000 tons to be taken by the plaintiff before the 1st of March 1859, upon the terms that the defendant would, when thereunto required, from time to time, between the said 5th of March 1858 and 1st of March 1859, ship certain portions of said 3000 tons of coal on board such ships as the plaintiff should procure and provide for said purpose. That the defendant was aware that the plaintiff entered into said contract for the said coal, for the purpose and with the intention of re-selling same to divers persons at a profit. That the plaintiff afterwards, and after the making of the said contract, to wit, on the, &c., chartered and provided two ships, to wit, the "M." and "D.", for the purpose of having the said coal shipped on board them by the defendant for the plaintiff, pursuant to the terms of said contract, to be by said ships conveyed to the respective ports for which the plaintiff had so chartered them as aforesaid, and then gave notice thereof to the defendant, and required him to load the said ships with portions of the said coal. That the said defendant did, in pursuance and part performance of his said contract, ship certain portions of said coal on board the said ships so chartered by the plaintiff as aforesaid. That the plaintiff had chartered one of said ships, to wit, the "M.", for the port of Cork, and the other of said ships, to wit, the "D.", with the option of despatching her to either of the ports of Cork or Waterford. That the plaintiff had selected to despatch the said ship "D." to the said port of Waterford.

Breach.—That, although the plaintiff was always ready and willing and offered to do all things on his part and behalf to be performed and done, and had always been ready and willing to accept and receive the said portions of coal, so shipped as aforesaid on board the said two ships, and to pay for the same at the price

* Before the Full Court.

aforesaid, of all which the said defendant hath always had notice, yet the defendant, after he had so as aforesaid shipped the said coals on board the said two ships, for and on behalf of the plaintiff, and in pursuance of the said contract, although often requested so to do, refused to allow plaintiff to despatch either of said two ships to the ports for which the plaintiff had so chartered them as aforesaid, or at all; and afterwards, and in breach of his said contract, despatched the said ships in his own name, and on his own account, to the port of Cork, and there sold and delivered the coals so as aforesaid shipped on board thereof, to divers customers of the plaintiff, to wit, Messrs., &c., at a profit, and on account and on behalf of the defendant.—Averment of special damage.

H. T. 1859.
Queen's Bench
KENYON
v.
TAYLOR.

To this count the defendants pleaded three defences.

First defence.—That the defendant did not contract with the plaintiff, as in the said count alleged.

Second defence.—And for a further defence to the said first count, the defendant says, that the contract in said first count mentioned contained an additional term not mentioned in the said first count, to wit, that the plaintiff would pay the defendant for each cargo or portion of said coals upon the delivery or shipment of such portion or cargo, free on board at the North Docks, Liverpool; and the defendant says that, after the making of the said contract, the plaintiff provided a certain ship, to wit, the "A." for the purpose of having certain portions of the said coals shipped on board the same for the plaintiff by the defendant; and that the plaintiff required the defendant to load the said "A." with portions of the said coal, in pursuance of the said contract, and to despatch the said vessel, when so loaded, to the port of Waterford; and that the defendant, in pursuance and part performance of the said contract, did deliver free on board the said ship "A." at the North Docks, Liverpool, such quantity of the said coals as the plaintiff required the defendant to ship on board the said vessel, to wit, 182 tons, and gave notice thereof to the plaintiff; and that the defendant afterwards, and in pursuance of the directions of the plaintiff, despatched the said ship "A." for the said port of Waterford; and the defendant thereupon required the plaintiff to pay the defendant for the portion of the said coals so shipped and delivered on board the said ship "A." according to the rate mentioned in the aforesaid contract, to wit, at the rate of 8s. per ton, and that the plaintiff thereupon absolutely refused to pay for the said portion or cargo of said coals, in pursuance of the said contract, or at all, until the said ship "A." should have arrived at the said port of Waterford; and the said plaintiff absolutely refused to pay for any other portion or cargo of said coals, when and so

H. T. 1859. soon as same should have been delivered and shipped free on board
Queen's Bench. at the North Docks, Liverpool, in such ships as the plaintiff should
KENYON procure and provide for the purpose; but said plaintiff required
v. said defendant to wait for payment of each such portion or cargo
TAYLOR. of said coal, until such portion or cargo should have arrived in
Ireland; and said plaintiff refused to perform his part of the said
contract, and thereupon the defendant rescinded the said contract, as
he lawfully might; and the defendant says that, at the time of such
rescission, the defendant had, in pursuance of the said contract,
loaded and delivered other portions of the said coals free on board
the ships "D." and "M.", in said first count mentioned, in said North
Docks, Liverpool; and after such rescinding of said contract, and
before said plaintiff had acquired the possession or right to posses-
sion of the said ships, "M." and "D.", or the cargoes thereof, and
upon the plaintiff's refusal to comply with the said contract, the
defendant sold the said cargoes of coal, as he lawfully might;
and the defendant says that, until the plaintiff had actually refused
to comply with the said contract, as aforesaid, defendant was al-
ways ready and willing to allow the plaintiff to despatch the
aforesaid two ships, or either of them, for the ports for which the
same were chartered, upon defendant being paid by the plaintiff
for such portions of said coal as had been theretofore delivered by
the defendant free on board, at the North Docks, Liverpool, on
board such ships as the plaintiff had procured and provided for that
purpose.

Third defence.—And for a further defence to the said first count,
the defendant says, that the contract in the said first count men-
tioned contained the additional term in the last defence mentioned,
and that the defendant was always ready and willing and offered
the plaintiff to allow him, the plaintiff, to despatch the said ships, "D."
and "M.", to the ports for which the same had been chartered, upon
the said plaintiff paying the defendant at the rate mentioned in the
contract in said first count, for the portions or cargoes of said coals
which had been shipped on board the said "D." and "M." respectively;
and the defendant required the plaintiff to pay for the said portions
or cargoes of the said coals, upon the delivery and shipment thereof
on board the said vessels respectively; and the plaintiff absolutely
refused to pay the defendant for the said cargoes at the said time, or at
all, until the said cargoes should have arrived respectively in Ireland;
and that thereupon the defendant refused to allow the said vessels to
be despatched, until their said respective cargoes of coals should
have been paid for; and upon the plaintiff's refusal to pay therefor,
as aforesaid, and before the plaintiff had acquired the possession or

right of possession of the said vessels, or their cargoes, said defendant sold the said cargoes, as he lawfully might.*

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Queen's Bench.

KENYON

v.

TAYLOR.

Shekleton (with him *Macdonogh*) moved to strike out the second and third defences, as being framed to embarrass and delay the fair trial of the action, and as being an argumentative denial of the contract stated in the plaint. He contended that it was obligatory on the plaintiff to prove the contract alleged by him in the plaint, and that defences which stated a contract different from that which was alleged by the plaint embarrassed the plaintiff, by argumentatively denying the plaintiff's cause of action. That these defences amounted to a special traverse, which is now abolished (*a*) ; and that the plaintiff might avail himself of them, under the general traverse in the first defence, without unnecessarily loading the record with complicated pleadings. He cited *Mosely v. M'Mullen* (*b*), and the judgment of Pennefather, B., therein ; *Boake v. McCracken* (*c*), and the judgments of Monahan, C. J., and Ball, J., therem. He also contended that in England, although the meaning of the plea of *non-assumpsit* is limited to a denial of the contract, yet special matter may be given in evidence under that plea : *Jervis' New Rules*, p. 126 ; *Haysleden v. Staff* (*d*) ; *Dawson v. Collis* (*e*).

D. Lynch and *Palles*, contra, contended that the plaint did not state the whole contract, but, on the contrary, omitted a material term, which was supplied by the defences. That the Common Law Procedure Act 1853 (ss. 56, 69) rendered it necessary to plead specially in such a case as the present. They relied upon the judgments of Torrens and Jackson, JJ., in *Boake v. McCracken*, and cited *Habgood v. Paul* (*f*). As to the defences being pleaded in an embarrassing manner, they argued that such pleas were unavoidable in a case where the contract was to deliver goods in portions, and where payment for the portion delivered had been refused ; and, on this point, they cited *Withers v. Reynolds* (*g*).

Macdonogh, in reply, argued that the defences amounted to the general issue, and cited *Nash v. Breeze* (*h*). He also suggested that the special matter might, by consent, be given in evidence under the traverse of the contract, as was done in *Mosely v. M'Mullen*, a course which would render the pleadings in question unnecessary.

(*a*) Com. Law Proc. Act 1853, s. 61. (*b*) 6 Ir. Com. Law Rep. 69.

(*c*) 6 Ir. Com. Law Rep. 259. (*d*) 5 Ad. & Ell. 153.

(*e*) 10 C. B. 523.

(*f*) 8 Ir. Com. Law Rep., App., xxiii.

(*g*) 2 B. & Ad. 862.

(*h*) 11 M. & W. 352.

* NOTE.—Leave had been obtained to plead these defences.

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LEFROY, C. J.

We are all of opinion that we ought to refuse this application. It has been rested upon two grounds: the one is a very important ground for our consideration, as it involves the practice of the Court, namely, whether these are proper defences? and the other ground is, that, supposing them to be proper defences under the circumstances of the case, yet have they been pleaded in a manner calculated to embarrass the plaintiff? It appears to us that no ground of embarrassment has been shown in the manner in which these defences are pleaded, and the remaining question therefore is, whether the defences are objectionable in themselves? The first defence is a traverse of the contract, and the other two defences amount to special pleas in confession and avoidance. The question then is, if the defendant were to go to trial upon the traverse, merely denying the contract, could he properly give in evidence under that traverse that which is not a denial of the contract, but a confession that he did enter into a contract, to which, however, was attached a qualification which enables him to defend himself against the action (*a*)? Now, I ask here, as I asked upon a former occasion (*b*), how is a person to defend himself under the present system of pleading, in such cases as the present, otherwise than by pleas like these? The general issue has been put an end to, under which the defendant might formerly have given in evidence either a denial of the contract, or a qualification of the contract, according to the circumstances of the case, whereby he might have defended himself against the action. But what has the defendant done here? He has stated the contract according to what he alleges to be the truth, and having so stated it, he sets out matters of fact, which, if true, constitute, as he avers, a defence for him according to the contract as it really existed. Now in what way can the matter be stated so fairly between the parties as in this very manner? The defendant does not deny the contract generally, and thus leave his adversary under the impression that he goes to trial only upon the question whether or not there was any contract: but, on the contrary, admitting that there was a contract, he says, there was an additional term in it, which the plaintiff has omitted to state, and the breach of which gave the defendant a right to rescind the contract, namely, that the contract was to deliver the coals in portions, and at different times, each portion to be paid for on delivery; and he avers that the plaintiff having refused so

(*a*) Com. Law Proc. Act 1853, s. 56.(*b*) 8 Ir. Com. Law Rep., App., xxiv.

to pay upon delivery, and having thus broken the contract upon his part, he, the defendant, rescinded the contract, as he insists he had a right in law to do. The defendant, therefore, alleges that the contract as it really existed entitles him to avail himself of this defence. If such a defence be not valid in law, that objection should be taken by demurrer. We cannot, when the whole case is set out upon the pleadings in a manner which we consider neither embarrassing nor equivocal, by setting aside these defences, allow this motion to be substituted for a demurrer, which would enable the parties to take the opinion of another Court upon the matter of law. That would be a course which we cannot sanction, and we must, therefore, refuse this motion.

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CRAMPTON, J.

I am of the same opinion; and I think that the plaintiff has failed to sustain his motion, either on the ground of embarrassment in settling the issues to be tried on these pleadings, or upon the ground of embarrassment to the Judge who may try this case. I think also that the plaintiff's motion fails upon the remaining ground, namely, whether these defences, which have been objected to, are proper defences to be pleaded in this action. As both the general issue and special demurrs have been abolished by statute, a party, if he has any case by which to defend himself against the claim which is made upon him, ought to put his case upon the record, and thus apprise his adversary of the defence which he intends to rely upon (*a*). Unquestionably, before the Common Law Procedure Act was passed, these defences would not have been permitted; they would, however, have been then open to the defendant, under the plea of the general issue. But since the late Act, there is a difficulty in making such a special defence available. I quite concur in the opinion of Parke, B., in *Nash v. Breeze* (*b*), that a plea which qualifies the contract declared upon, and introduces a new condition into it, amounts to the general issue; and although that was the old system of pleading, yet the plaintiff must still prove the contract upon which he brings his action, and if he fails in proving every part of it, he must fail altogether. I think, therefore, that these second and third defences are unnecessary: but, even allowing them to be unnecessary, I think it has been clearly shown in the argument that the defendant has the option, either to put his special case upon the record, and also to rely on his traverse of the contract alleged by the plaintiff, or to rely on the traverse alone. In *Mosely v. M'Mullen*, the Court

(*a*) Com. Law Proc. Act 1853, s. 56.

(*b*) 11 M. & W. 355.

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of Exchequer was of opinion that the defendant had such an option. It is not for us speculate upon motives or consequences: we are bound to carry out this Act of Parliament, notwithstanding the great inconvenience which, as it was suggested in the course of the argument, may arise from the introduction of long pleadings like these, upon which many issues may be framed; for, as my LORD CHIEF JUSTICE has pointed out, the defendant thus specifically and distinctly, upon the record, apprises the plaintiff of the grounds upon which he intends to rest his defence. This, however, the defendant must do without embarrassing the plaintiff by pleading defences of such a nature as that it may be difficult or even impossible for the plaintiff effectually to take issue upon them.

PERRIN, J.

I concur in the rule which has been so clearly and satisfactorily stated by my LORD CHIEF JUSTICE.

O'BRIEN, J.

I am also of the same opinion; and, upon looking at the plaint, I think the defendant would be prejudiced, if he were not allowed to plead these pleas. It may be doubted whether the defendant could give these special matters in evidence under a mere traverse of the contract; and if the course suggested at the Bar were adopted, namely, by consent to allow evidence of the special matter to be given under the traverse of the contract, as was done in *Mosely v. McMullen*, it would, in my opinion, be more embarrassing than these defences, both to the Judge who may try the case, and afterwards to the Court, if the case should come before it; and I do not think that there would be any saving of expense in adopting that course.

Motion refused with costs.

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ACCORD AND SATISFACTION.

The Corporation of D., in 1820, demised premises to F., at a rent which, in 1837, by resolution, they granted permission to F. to reduce on payment of a fine; and in 1842, pursuant to such resolution, and in consideration of a fine, and of the surrender of the lease of 1820, the said Corporation granted a new lease to F.'s representatives at such reduced rent. The said Corporation of D. being abolished by the Municipal Corporation Act (*Ir.*), 3 & 4 *Vic.*, c. 108, the reduced rent was duly paid to the new Corporation constituted under that Act, and half-yearly receipts given by them for the same, containing a proviso that "the rent had been so received without prejudice to the right of the Corporation to impeach the title and tenure under which the representatives of F. claimed to hold the said premises." Leases similar to the lease of 1842 having been held by the House of Lords to be void, as contravening the 3 & 4 *Vic.*, c. 108, s. 140, upon an action of covenant for rent upon the lease of 1820—*Held*, that the lease of 1820 being a valid instrument, and not surrendered in law, the receipts for the reduced rent were not evidence of an agreement to receive that rent in satisfaction of the rent reserved by the lease of 1820; and that there was no consideration for such agreement.

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goes to trial thereon, although under a protest, and a verdict is found against him, the Court will not, after the trial, set aside the proceedings. Where a party intends to insist on the invalidity of the proceedings, by reason of such alteration, his proper course is to retire from any further proceeding in the cause.

The alteration of a writ, after it has been sealed, without the authority of the Court, is wholly inexcusable, and the Court will visit such delinquency with the utmost severity. Q. B. *Freeman v. Kellett* 52

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A former motion to bail prisoners, who were charged with sheep-stealing, had been refused by the Court, upon the ground that the alleged existence of a wide-spread conspiracy, and the probable indemnification of the bail by a subscription fund, rendered it unlikely that the prisoners would appear to take their trial, if admitted to bail (*7 Ir. Com. Law Rep.*, 19); but no indictment for conspiracy having been preferred against the prisoners at the following Assizes, and indictments for stealing and maliciously injuring sheep only having been found against them, the Court now ordered the prisoners, whose trial had been postponed by the Crown, and who had been in gaol for seven months, to be admitted to bail; it being denied by affidavit that the subscription fund would be applied otherwise than for the *bona fide* relief of destitution, for which purpose it had been collected. The Court will not detain prisoners in custody, upon affidavit of belief that, by a time specified, the Crown will have sufficient evidence to enable them to go to trial. Q. B. *The Queen v. Gallagher* 93

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To an action by the indorsee against the drawer of a bill of exchange, the defendant pleaded that a bill similar to that sued on, and purporting to be accepted by him, was shown to him by the plaintiff's agent, who was then informed by the defendant that the acceptance was a forgery; but at the agent's request, and without having then or since received any consideration for so doing, the defendant wrote his name as drawer under the forged acceptance; and that, subsequently, at the request of the plaintiff's agent, the defendant signed and indorsed over to him the bill which was now sued on, and received back the spurious bill; and that, save as aforesaid, the defendant did not receive any consideration for the making or indorsing of the bill sued on.—*Held*, upon demurrer, that the defence was not an answer to the action, it being consistent with the defence, that the plaintiff was the holder of the bill for value. Q. B. *M'Kenna v. Dordall* 70

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The mere continuance in possession, by the debtor, of property which he has assigned by bill of sale to his creditor, is not, *per se*, such a badge of fraud as renders the bill of sale fraudulent and void; it is *only prima facie evidence of fraud*.

Continuance in possession, to render such a transaction void, must be accompanied by other circumstances, from which the jury may arrive at the conclusion that its object was fraudulent.

The question of fraud or no fraud is *always* one for the jury, not for the Judge. Q. B. *Macdonald v. Swiney* 73

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In informations for acts done contrary to the 16 & 17 Vic., c. 107 (the Cu-

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toms Consolidation Act 1853), counts following literally the forms given in schedule B to that Act are good.

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Held also, that the presumption was, that the charter-party had been brought in due time to the Stamp-office to be stamped.

The requisitions of the 5 & 6 Vic., c. 82, s. 34, are complied with, if a charter-party, unstamped when executed, is brought to the officer at the Stamp-office, with the duty, within fourteen days from its execution, or with the duty and penalty, after such period of fourteen days, but within one calendar month from its execution, and it thereupon becomes the duty of the officer duly to stamp the charter-party; and if the Act has been thus complied with, the validity of the charter-party is not affected,

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By the 32 G. 3, c. 24 (Ir.), the Hibernian Mine Company, which was thereby incorporated, was empowered to open and improve the harbour of Arklow. In consideration of the expense and risk in making and maintaining such harbour, the Company was thereby authorised, "from time to time, and at all times thereafter," to levy a toll not exceeding 2s. per ton, upon *every ship or other vessel entering the said port or harbour, drawing more than five feet of water.*"—*Held*, that the Act imposed the toll upon a class of vessels entering the harbour, whose ordinary draught of water exceeded five feet, and that a vessel whose ordinary draught exceeded that depth was not exempt from toll, although when entering the harbour she might not actually draw five feet.

Although when an Act of Parliament, imposing a duty or toll, is equally capable of two constructions, it is to be construed so as to relieve, and not to impose a burden upon the subjects of the realm, yet, if of the two constructions the one is reasonable, and will effect the object of the Act, whereas the other construction will not, the former is to be adopted—[*Per LEPROY, C. J.*]—Q. B. *Hibernian Mine Company v. Tuke* 321

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A note or memorandum in writing, made subsequently to, but evidencing a previous oral contract, is sufficient, within the 2nd section of the Statute of Frauds, 7 W. 3, c. 12 (the 4th section of the English Act).

A past consideration, from which the law will not imply a promise, will support a subsequent express promise, in itself unobjectionable, if such consideration be moved by the previous request of the party promising.—[Review of the cases upon this subject.]

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A procured B to execute to him an assignment of a lease, by means of a false and fraudulent representation, that he A was executor and devisee of W., and in that capacity a creditor of B. B was in fact indebted to W. for part of the alleged consideration money.—*Held*, that A might main-

tain ejectment, the fraudulent representations not being sufficient in Law, to avoid the deed, and a Court of Law being incompetent to do perfect justice between the parties.

Alterations made in a deed, after execution by the grantee named in it, though material, will not prevent the deed being received in evidence on his behalf to show the estate which passed by it, and which was not divested by the alterations. Ex Ch. Stewart v. Astor 35

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In an action for the breach of a contract for the sale, by the plaintiff to the defendant, of 200 barrels of extra clean new Riga flax-seed, of the growth of 1856, the plaintiff averred, that it was the duty of the defendant to deliver to him "extra clean new Riga flax-seed, of the growth of 1856, which should be good, sound and merchantable;" and assigned as breach, that the seed was bad, dirty and unmerchantable.

Held, upon demurrer, that the contract being express in its terms, no warranty could be implied in it that the flax-seed should be good, sound and merchantable. Q. B. Rose v. Faren 46

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W. C., by his will, devised part of the lands of S. to J. C., and directed that E. C. should be entitled, under his will, to receive from J. C. the sum of £26, being the rent of the portions and denominations thereinbefore bequeathed to him. J. C. and E. C. afterwards verbally agreed that J. C. should have an additional denomination of land, which W. C. had devised to E. C., reserving to E. C. grazing for ten head of cattle, at the rent of £18. 10s., in lieu of the rent of £26. E. C. subsequently served the plaintiff, the assignee of J. C., with a notice to quit, treating him as a yearly tenant, and brought a civil-bill ejectment against him, which was dismissed by the Assistant-Barrister, upon the ground that there was no yearly tenancy proved to exist, but the dismiss was afterwards reversed, on appeal, by the Judge of Assize, and a decree for possession made, which was duly executed. Thereupon the plaintiff brought a cross-ejectment, and relied upon the invalidity of the civil-bill proceedings. —*Held*, that notwithstanding that the civil-bill proceedings appeared *prima facie* regular, the plaintiff in the cross-ejectment might show the non-existence of such a tenancy between the parties as would have been required to give the Civil-bill Court jurisdiction, notwithstanding the 133rd section of the 14 & 15 Vic., c. 57. C. P. *Coneys v. Coneys* 379

ELECTION.

Upon the election of a Member of Parliament, the plaintiff's vote, having been objected to, was rejected by the Returning-officer's deputy, as being

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the vote of a paid agent of the candidate for whom it was tendered, and a note to that effect was entered by the deputy in the poll-book.—*Held*, that this substantially amounted to a recording of the vote by the deputy, whereby it became the duty of the Returning-officer, on the inspection of the poll-book, to cast up that vote with the other votes recorded for the same candidate; and for breach of which duty the Returning-officer was liable in an action.

Quare.—What would have been the duty of the Returning-officer, if the deputy had not recorded the vote at all, or had recorded it for a candidate other than the one for whom it was tendered?

A deputy has not authority to inquire into any objection to a vote tendered to him, except by putting to the voter the two questions set forth in the 13 & 14 Vic., c. 69, s. 88.

Upon a trial at Nisi Prius, Counsel for the defendant objected to evidence tendered by the plaintiff; the Judge admitted the evidence, but took a note of the objection. Exceptions were taken, on the part of the defendant, to other rulings of the Judge upon the trial, but not to the admission of this evidence.—*Held*, that the objection must be considered as abandoned. Ex. Ch. *McGowan v. Sedley* 342

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FISHERY.

Trespass, for fishing in a several fishery. By letters patent of the 14th Charles the First, several denominations of land abutting on the north bank of the Owen Gorman River were granted to M. (through whom the defendant claimed), his heirs and assigns; "and also the half of all fisheries and taking of salmon, and all other kind of fish in the River of Owen Gorman, near said lands, from the lands of C. to the lands of M." (which included the spot where the fishing complained of took place); "and also all fisheries of salmon, herrings and all other kinds of fish in the seaport or creek there, in or near the said town or lands, or any part thereof." Certain other lands abutting on the south side of said river were, at different times, conveyed to the plaintiff's ancestor. The plaintiff proved that he had exclusively fished in the Owen Gorman River, with nets, for upwards of forty years, without interruption; but it also appeared that, prior to that time, the persons claiming under the patent of Charles the First had ex-

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ercised a right to fish with nets on the north bank of the river, and that their tenants had since that time uninterruptedly fished there with rods.

—*Held*, that as the documents by which the parties respectively deduced their title established the existence of a tenancy in common in the fishery, the plaintiff could not, by any length of user or enjoyment, obtain an exclusive right of fishery in the river, to the exclusion of his co-tenant in common, nor would a grant of such exclusive fishery be presumed.

The mere non-user by one tenant in common, of that which belongs to both him and his co-tenant in common, cannot raise the presumption of a grant.

Semble.—Acts by one tenant in common, which entirely destroy or put an end to the enjoyment of the property in common, may amount to an ouster by such tenant in common of his co-tenant in common. Q. B. *Beauman v. Kinsella* 291

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In order to create a valid judgment mortgage, under the 13 & 14 Vic., c. 29, the affidavit of registry must accurately comply with the requisitions of the 6th section of that Act.

Therefore, where the judgment debtor, who was an hotel and shopkeeper, was described in the affidavit merely as "Bridget Curran, of Killorhan, in the county of Kerry, widow"—*Held*, insufficient to create a judgment mortgage.

Held also, that the defect was not remedied by the fact that the description in the affidavit of registry strictly followed the judgment.

A mere error of judgment, or a mistake upon a point of law, or in

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the construction of a difficult Act of Parliament, is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake ; in such cases, regard must be had to all the circumstances of the transaction, and if they be such as show gross or culpable neglect on the part of the attorney, he will be responsible. Q. B. *Crosbie v. Murphy* 301

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When Magistrates exercise a jurisdiction vested in them by Act of Parliament, the Court of Queen's Bench, in the absence of any allegation of corruption, has no jurisdiction to review or control such discretion ; and, therefore, the Court refused to direct Magistrates to grant a certificate of character to a party, to enable him to obtain an excise license, pursuant to the 17 & 18 Vic., c. 89, s. 11, the Magistrates having considered the application, and refused it. Q. B. *The Queen v. Justices of King's County* 50

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1. A demised lands to his son B, for three lives, renewable for ever, in as full, large and ample a manner as B was then in possession thereof, and A covenanted that he would, at all times thereafter, during the continuance of the demise, give to B free liberty of ingress, egress and regress to cut and carry away as much turf of and on the bog of M., adjoining the lands, as the said B, his heirs

or assigns, or his or their undertenants, should have occasion for, to use on the said demised premises during the continuance of the demise, to be cut in such places and in such manner as A, his heirs, &c., should appoint, and not otherwise.—*Held*, that a person who subsequently became undertenant, and occupied a newly built house, was entitled to turbary on M.

Hill v. Barry (Hay. & Jon. 688) followed.

Upon the marriage of B, the demised lands were conveyed by A and B, as separate granting parties, to re-lessees, to uses. A conveyed the lands "in as large and ample a manner as the same were then in possession of B," together with all "commons, common of pasture and turbary," rights and appurtenances whatsoever to the premises belonging or therewith usually held or enjoyed. The grant by B contained general words equally comprehensive.

Held, that the right of turbary created by B's lease was preserved or newly granted by the settlement, notwithstanding the merger. E. Duggan v. Carey 210

2. By indenture in 1724, A demised arable land, pasture and bog to B, for three lives renewable for ever, excepting out of the demise "all mines, minerals, coals and quarries of marble, freestone and slate, and all other royalties whatsoever." In the indenture B covenanted as follows:—"That it shall be lawful for A, his heirs and assigns, his and their servants, labourers and workmen, with horses and carriages, from time to time, to bore, dig and search for mines, minerals, coals and quarries of marble, freestone and slate, in any part of the demised premises, except in houses, gardens, orchards, courts and yards, and to carry away the same, and likewise such turf as A, his heirs and assigns, shall give liberty to cut,

make and save, in the mosses or turbary belonging to the said demised premises ; A, his heirs and assigns, allowing to B, his heirs and assigns, reasonable amends and satisfaction for the waste, spoil and damage which they shall sustain on account of boring, digging for and carrying away such mines, minerals, coals, marble, freestone and slate."—*Held*, affirming the judgment of the Court of Queen's Bench, that this clause reserved a right to A, his heirs and assigns, by his and their servants, labourers and workmen, to cut such turf, both for sale and consumption, as he and they should give liberty or point out in that behalf.

Held also, that A, his heirs or assigns, could not grant this right to any person, not being his or their assignee, or his or their servant, labourer or workman.

Quare, whether this covenant did not give to A, his heirs and assigns, in addition to the right to cut turf for his and their benefit, the right to authorise their servants, labourers and workmen, to cut turf for their own consumption and benefit?—[*Per CHRISTIAN, J.*]—*Ex. Ch. Moore v. Orr* 347

3. L demised to D certain lands, described as "containing fifty-five acres, or thereabouts;" and D covenanted to pay, during the term, the yearly rent of £1. 6s. by the acre, for each and every acre said premises contained, and proportionably for rods and perches. The quantity contained in the lease was not ascertained by measurement, and for thirty years rent was paid as for a quantity of fifty-five acres. To an action of covenant for the arrears, the defendant pleaded that the lands were stated in the lease to contain fifty-five acres, and that, until the 29th of September 1857, there had been no more precise ascertainment of the quantity ; and it being uncertain what was the quantity, the plaintiff

agreed to take the rent, on the basis of the lands containing fifty-five acres, in consideration of the defendant agreeing to pay it at that rate, and that same was accordingly paid and accepted by plaintiff, in satisfaction and discharge of each half-yearly gale.—*Held*, that the plaintiff's receipts and letters vouching the payment of the rent in full, and demanding it upon that basis, were evidence to sustain the agreement pleaded.

Semble (per Pigot, C. B.)—The plea disclosed a sufficient consideration for the agreement.

It is not open to the plaintiff, upon a new trial motion, to impeach the validity of his adversary's pleading; he should move for judgment *non obstante veredicto*. E. *Lysaght v. Delacour* 453

LEASE.

See ACCORD AND SATISFACTION.

1. By indenture of 1824, the lands of S., in the parish of D., were demised, together with all and singular the bogs, mosses, &c., tithes great and small, houses, buildings, &c., appurtenances and advantages thereunto belonging, or in anywise appertaining, and therewith usually held, occupied and enjoyed, as part and parcel thereof. The tithes of the lands were in fact ecclesiastical property, vested in the rector for the time being of the parish of D., and had, ever since the date of the demise, been duly paid by the lessee and his assigns to the said rector and his successors.—*Held*, upon demurrer, that the indenture was not intended to operate as a demise of the tithes of the lands, and that the rent was not apportionable in respect thereof.

Rules for the construction of general words in deeds and Acts of Parliament. Q. B. *M'Neill v. Crommelin* 61

2. A tenant holding under a lease for

lives; containing a covenant for renewal, having been noticed under the Tenantry Act to renew, failed to do so; and the landlord served him with notice to quit (all the lives in the lease having expired), and having brought a civil-bill ejectment, obtained a decree for possession on the 10th of January 1856, with stay of execution for one month.

Before the expiration of the latter period, the tenant filed a bill, to compel specific performance of the covenant for renewal of the lease, and obtained an *ad interim* injunction to stay proceedings until the hearing of the petition, which was dismissed on the 27th of June, and the injunction dissolved. Upon the 28th, the landlord served the tenant with notice of his intention of taking possession under the civil-bill decree, and took possession upon the 1st of July; but, in the meantime (between the 28th of June and the 1st of July), the defendant removed mill-stones and machinery from the demised premises, notwithstanding a covenant in the lease to deliver up the mill and premises at the end of the term.—*Held*, that the tenant was not entitled to remove the mill-stones and machinery from the premises—(*per Monahan, C. J.*, and *Keogh, J.*), because he had failed to do so during the continuance of his term.—(*Per Ball, J.*), because the stay of execution of the decree had the effect of an agreement between the parties, under which the tenant was bound to deliver up the premises in the same condition they were in when the decree was pronounced by the Assistant-Barrister. C. P. *Deeble v. M'Mullen* 355

LEASE, CONSTRUCTION OF.

See LANDLORD AND TENANT, 2.

LEGACY.

See WILL, 1.

**LIABILITY OF COMMISSIONER
FOR ACTS OF WATCHMAN.**

*See Towns Improvement (Ir.)
Act, 1854.*

LIABILITY OF MASTER.

See MASTER AND SERVANT.

**LIABILITY OF RETURNING-
OFFICER.**

See ELECTION.

LIBEL.

1. Upon the trial of an issue at Nisi Prima, it is the duty of the Judge to permit Counsel to proceed with his statement of the matters which he proposes to give in evidence, in order that the Court above may have before it both the evidence proposed to be tendered, and also the ruling of the Judge thereon. *Q. B. Listowel v. Gibbons* 290
2. In libel, the plea that the publication complained of is not a libel is a good plea. *E. Nixon v. Harvey* 446

LIMITATIONS, STATUTE OF,

1. In an action by an administrator, for moneys lent, paid, &c., and for work and labour done by the intestate, in his lifetime, to and for the defendant, the latter pleaded, as to part of the cause of action, the Statute of Limitations. The plaintiff, in answer thereto, relied upon the following passage of a letter written to her attorney by the defendant, within six years next before action brought:—"If Mrs. H. (the plaintiff) can prove I owed her late husband any money for costs or otherwise, I am willing to have it settled at once. This can easily be done, by producing the receipts for the amounts of money he had of mine in his hands."—*Held*, reversing the judgment of the Court of Common Pleas (*CRAMPTON, J., dissentiente*), that the above document was evidence of such an absolute promise to pay as would defeat the bar of the Statute of Limitations,

implied as a promise to settle necessarily implied a promise to settle the account. *Ex Ch. Holmes v. Smith* 424

2. R. B. died in 1819, seized in fee of C. East and of other lands, and of a life interest in C. West; the reversion of which latter estate belonged to L.—R. B., by his will, devised certain real estates to his widow, for her life, with a power of appointing same in fee to either of the sons of P. B., which she exercised in favour of S., the father of the defendant. Upon the decease of R. B., the father of the plaintiff, G. E. B., disputing the title of the widow, entered upon all the lands, including C. West, adversely, as regards the latter, to the rights of the L. family, and continued in undisturbed possession until 1825. From 1825 until 1841, the lands of C. West were under receivers appointed by the Court of Chancery, at the instance of judgment creditors of R. B., G. E. B. and others. The judgments against R. B. had been revived against the heir and terrenants of R. B., and G. E. B. had been served as such. From 1841 to 1844, G. E. B. had resumed and continued in the actual enjoyment of the rents and profits of C. West; and, upon his death, his son and heir-at-law, P. B., succeeded him in possession, until he was evicted therefrom, as well as in respect of the other devised estates, in 1850, by the present defendant S. B., claiming as the eldest son and heir-at-law of S. B., the appointee. A cross ejectionment was brought in 1857, by P. B., the eldest son and heir-at-law of G. E. B., and a mortgagee of the latter, who had not been a party to the former action, who claimed to recover C. West, upon the ground that G. E. B. and his son had acquired an estate in fee-simple in these lands, by an uninterrupted possession of twenty years and upwards, by the operation of the 3 & 4 W. 4, c. 27, ss. 2, 3 & 34. At the trial, the Judge

MACHINERY.

told the jury, that the appointment of the receivers, at the instance of the creditors of R. B., and their interference with the lands, was such an interruption of the twenty years' possession as would prevent the statute from transferring to G. E. B. and his heirs an estate in fee-simple. The jury found that R. B. had only a life estate in C. West, but that G. E. B. and the plaintiff P. B. had not an uninterrupted possession of the same for twenty years.—*Held*, affirming the judgment of the Common Pleas, that the possession of the receiver was not such an interruption of the possession of G. E. B. and P. B. as to prevent the operation in their favour of the Statute of Limitations, and that an indefeasible title against the L. family, and the rest of the world, had accordingly been acquired. Ex. Ch. *Groome v. Blake* 428

MACHINERY.

See LEASE, 2.

MAGISTRATES.

In an action against two Justices, the three first counts of the summons and plaint stated a cause of action in trespass for an illegal conviction at Petty Sessions. The plaintiff had been imprisoned for three weeks, by an order of the defendants; and the conviction, which was made, as alleged, without jurisdiction, but appeared regular upon the face of it, having been removed by *certiorari* into the Court of Queen's Bench, it was, upon argument, affirmed.—*Held*, that the conviction was one which might be quashed upon application to the Court of Queen's Bench, within the meaning of the 2nd section of the 12 Vic., c. 16 (Protection of Justices Act), and that the three first counts should be set aside, under the 7th section of that Act.

The fourth count complained that the defendants, unlawfully, maliciously and without any reasonable or probable cause, convicted and impris-

MASTER & SERVANT. 541

oned the plaintiff, &c., although the defendants had not any jurisdiction to make said conviction or order, and although no complaint had been made against, or summons served upon, the plaintiff.—*Held*, assuming that the fourth count stated a cause of action within the 1st section of the 12 Vic., c. 16, that it could not be set aside under the 7th section.

The proviso in the 2nd section of the 12 Vic., c. 16, applies only to the class of actions mentioned in that section.

Held, also, per Pigot, C. B., and Pennefather and Greene, BB., that the fourth count ought to be set aside as embarrassing.

Held, per Richards, B., that the fourth count was a count in trespass, and ought to be set aside, under the 7th section.

In this case the Court (Richards, B., *dissentiente* upon this point) set aside the plaint only, and allowed the writ to stand as a summons, more than six months having elapsed since the conviction. Ex. Ch. *Lalor v. Bland* 115

MANORIAL LANDS.

A lord of a manor, by his will, made on the 3rd of March 1836, and containing words sufficient to pass the manor, devised his real estate in trust to B. Subsequently to the date of his will, he purchased certain lands which had originally formed portion of the manor.—*Held*, that the lands were not so re-annexed to the manor by the purchase as to pass under the devise.—(Pigot, C. B., *dissentiente*.)

Semble—They may be so re-annexed by escheat. *Semble*—The rents and services may be re-annexed by purchase. Ex. Ch. *Delacherois v. Delacherois* 1

MASTER AND SERVANT.

Where a master employs servants com-

542 MEDICAL CHARITIES.

petent to discharge their duties, and is not himself personally in default, he is not liable for an injury occasioned to one servant through the negligence of another, if they are at the same time engaged in a common service and a common employment:—

And therefore, where the plaintiff, a hired labourer of a Railway Company, while working upon the Railway, was injured by one of the Company's trains running against him, which train was guided by others of the Company's servants, who were fit and competent to discharge their duties:—*Held*, that the Company was not liable to the plaintiff for the injury which he had sustained.

It is the duty of servants, both as regards the interests of their employer and their own safety, by the exercise of ordinary care and caution to prevent and avoid accident. Q. B. *M'Eniry v. Waterford and Kilkenny Railway Company* 312

MEDICAL CHARITIES ACT (14 & 15 Vic., c. 68, s. 8.)

Under the 14 & 15 Vic., c. 68, s. 8 (the Medical Charities Act), it is the duty of the Poor-law Guardians to determine and disburse the salaries of the medical officers appointed by the committee of management, the Poor-law Commissioners having power from time to time to regulate the amount of such salaries. Therefore, where the Poor-law Guardians of the B. Union refused to increase the salary of the medical officer of the dispensary district of the Union, pursuant to an order under the seal of the Poor-law Commissioners, founded upon a resolution of the committee of management, a mandamus was granted to enforce such order.

Under the 14 & 15 Vic., c. 68, s. 8, it is the duty of the Guardians to fix and disburse, subject to the power of the Poor-law Commissioners to raise or lower, the salaries of the medical officers of the Union. Q. B. *The Queen v. Bantry Union* 331

NOTICE.

MERGER.

See LANDLORD AND TENANT, 1.

MORTGAGE.

See JUDGMENT.

MUNICIPAL CORPORATION ACT

(3 & 4 Vic., c. 108, s. 140).

See ACCORD AND SATISFACTION.

NEGLIGENCE.

See JUDGMENT.

A, a parliamentary agent, sued B. for work and services, in obtaining the passing of a Private Act of Parliament. B. pleaded that it was part of A's employment to prepare and submit to Parliament a clause in the bill for providing for the payment of the costs of passing said bill, out of moneys to be raised in pursuance of same; and that, by reason of the carelessness, negligence, unskillfulness and default of A, the said clause was so incorrectly framed, that after the passing of the Act containing such clause, it became impossible to enforce the payment of the said costs in the manner thereby contemplated.—*Held*, upon demurrer to the plea, that the omission of the plaintiff to prepare an efficient clause for the above purpose materially affected the quality of the entire work, so as to exclude the possibility of a part performance, and consequently, that the matter of the defence was a good bar to the entire action, and did not merely go in reduction of damages.

Held also, that the fact of the imperfect clause having received the sanction of the Legislature did not excuse the act of A, in having prepared, and submitted same for their adoption. C. P. *Baker v. Milward* 514

NEW GRANT.

See LANDLORD AND TENANT, 1.

NOTICE.

See LEASE, 2.

NOTICE TO QUIT.

NOTICE TO QUIT.

See EJECTMENT.

PAYMENT INTO COURT.

See PRACTICE, 4.

PENALTIES.

See ACTION FOR PENALTIES.

PLEADING.

See LEASE, 1.

LIBEL, 2.

MAGISTRATES.

RAILWAY COMPANY.

1. An agreement between a landlord and his tenant, that the tenant would make permanent improvements upon the lands demised, and would lay out and expend money in so doing, and that the landlord would, upon request, pay the value of the improvements so made, was *Held* (the making of the improvements and their value being averred) to be properly made the subject of set-off to an action by the landlord for use and occupation.—
[RICHARDS, B., *dissentiente.*]

- Held*, secondly, that a plea of the agreement, which contained no allegation of a request or notice, was bad. E. Julian v. Loughnane 138
2. In an action for wrongful dismissal, the second count of the summons and plaint charged that, by agreement between the plaintiff and the defendant, the plaintiff entered into the service of the defendant, &c., such service to continue until one calendar month's notice to determine same should be given on either side. The defence pleaded was a traverse in terms of the whole of that allegation.—*Held, per* Pigot, C. B., and Richards, B., that this was a good plea;—*per* Greene, B., such a plea is bad, as putting in issue both the agreement and entry into the service. E. Winton v. Moore 234

PLEADING "SEVERAL MATTERS" WITHOUT LEAVE.

See PRACTICE, 1.

PRACTICE.

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POWER OF COMMISSIONERS TO ALTER SALARIES OF MEDICAL OFFICERS.

See MEDICAL CHARITIES ACT.

POWER TO MORTGAGE.

See SETTLEMENT.

PRACTICE.

See LIBEL, 1.

1. In an action for false imprisonment, the defendant pleaded that he was a Magistrate, and that he convicted and committed to prison the defendant Harriet, in his magisterial capacity, under circumstances which were set out, and which justified his conduct; and he also averred in the same plea, and without having obtained a rule for leave to plead "several matters," that the notice required by the 12 Vic., c. 16, s. 9 (the Act for the protection of Justices of the Peace), had never been served upon him.—*Held*, that this was a double and embarrassing plea.

Where the 45th General Order gives the opposite party leave to mark judgment without motion, if the other party, without a rule for that purpose, pleads or replies "several matters," for the pleading of which a rule is required by the Procedure Act, the words "several matters" refer to several matters pleaded in several distinct pleas, but are not intended to include several matters introduced into one plea. The same words in the 57th section of the Procedure Act have the same meaning. In such a case the proper course is to apply to the Court to set aside the plea as embarrassing. C. P. Austin v. Tuite 30

2. Where a judgment had for the plaintiff is reversed by the defendant, for error in fact, the defendant is not entitled to include in the judgment of reversal the costs of defending the action. E. Ivers v. Bainbridge 150
3. A brought an action against the D. and W. Railway Company, for an

alleged overcharge of third class parliamentary passenger fare, exceeding by one halfpenny the rate prescribed by Act of Parliament. It appeared by the affidavits that the action had been brought at the instigation of certain parties called the "Wayside Committee," associated for the purpose of lowering the Railway fares; that the plaintiff was a person in a very humble rank of life; and it did not appear that the plaintiff's attorney, who was also a member of the above committee, looked to him for payment of his costs. The Court, being of opinion, under the circumstances, that the present action could not be considered to be that of the plaintiff, and that it was substantially that of the committee, stayed the proceedings, until security for costs should be given. *C.P. Rice v. Dublin and Wicklow Railway Company* 155

4. Where a defendant pays money into Court in discharge of the action, and the plaintiff declines to accept the sum lodged, but fails upon an issue raised as to the sufficiency of the payment, the defendant is entitled to his full costs of suit, without any deduction by the plaintiff in respect of his costs up to the lodgment. *E. Farmer v. Fottrell* 228

5. *Semble*.—A certificate under the 97th section of the Common Law Procedure Act 1856 will not be sufficient, unless given by the Judge *at the trial*.

But where, at the trial, a certificate was obtained by the plaintiff that the case *was a fit one to be tried by a special jury*, which special jury, in fact, had been struck by the defendant, and on the following day the Judge amended the certificate, by adding that the case *was a fit one to be tried in the Superior Courts*: *Held*, that the certificate given at the trial was rightly amended, and might be sustained as one within the 97th section. *E. Brophy v. Jones* 240

6. A debt due by a third party, but not payable until a future day, is within

RAILWAY COMPANY.

the garnishee clauses of the Common Law Procedure Act 1856, and may be attached.

The mere possibility that, when the day of payment arrives, there may be a defence against the recovery of the debt, is no ground for resisting an attachment order.—[*Per Pigot, C.B.*]

In this case, the Court discharged the conditional order to pay, but allowed the attachment order to stand. *E. Sparks v. Younge* 251

PRESCRIPTION.

See SEVERAL FISHERY.

PRESUMPTION OF GRANT.

See FISHERY.

PRISONER.

See BAIL.

PROCEDURE ACT.

See PRACTICE, 1, 5, 6.

PROTECTION OF JUSTICES ACT (12 Vic., c. 16), SETTING ASIDE PROCEEDINGS UNDER.

See MAGISTRATES.

RAILWAY COMPANY.

See RAILWAY PASSENGERS ACT.

A sued the B. and B. Railway Company, the L. and C. Railway Company, and W. M'C., jointly, as common carriers, for the loss of a travelling case, containing watches, which he was carrying with him as personal luggage, he being a second-class passenger, travelling from B. to L., upon a through ticket. The defendants, amongst other defences, pleaded that they were entitled to the protection of the Carriers Acts (11 G. 4 and 1 W. 4, c. 68), and that the plaintiff had not made the requisite declaration as to the contents of the parcel; to which the plaintiff replied that the loss was occasioned by the felony of the servants of the defendants. The defendants also pleaded that the plaintiff was only entitled to carry personal luggage, and that the case in question did not come within that description; to which the plaintiff

RAILWAY COMPANY.

replied that its appearance was such as manifestly to indicate that it contained merchandise, to wit, watches, and not personal luggage, and that the defendants received it without objection or inquiry, and without demanding extra remuneration. It appeared at the trial that the case had been lost on the part of the journey between B. and L., which was owned exclusively by the L. and C. Railway Company; that plaintiff was prevented, by a servant of the L. and C. Company, from carrying the case in the same carriage with himself, on the pretence that the luggage-van was the proper place for its conveyance; that the interference of the servant was no part of his duty; that the case was not afterwards forthcoming, and that he subsequently denied all knowledge of the transaction. A question having been left to the jury, they found that a felony had been committed.—*Held*, that there was evidence to go to the jury, of a felonious taking of the goods.

The jury having found that the case manifestly contained merchandise, but not watches, a finding on the issue was directed to be entered for the plaintiff, the Court being of opinion that the particular description of merchandise was not the *gist* of the replication.

It appearing that W. M'C. was in no respect identified with the transaction, a verdict was directed in his favour. Upon a motion to arrest the judgment against the Railway Companies, in consequence of the acquittal of one of the co-defendants—*Held* that, although the action was partly in form *ex contractu*, yet, inasmuch as the substantial cause of action was the breach of an implied duty, the suit, notwithstanding the acquittal of one defendant, was maintainable against the others.

Held also, that the issuing of a through ticket was evidence of such a joint contract on the part of the several parties who shared in the price paid

RECEIVER.

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therefor as would render them liable for misadventures upon any portion of the journey, notwithstanding that the place where the loss occurred was exclusively owned by some one of the parties, and that it was occasioned by the act of his servants. C. P. Keys v. Belfast and Ballymena Railway Company 167

RAILWAY PASSENGERS ACT.

A sued the D. and W. Railway Co. for damages, for an alleged overcharge of one halfpenny beyond the rate of one penny per mile prescribed by the 9 and 10 Vic., c. 85, s. 6, for the conveyance of passengers by third class parliamentary trains. The distance travelled by plaintiff exceeded two miles and a half; and in respect of the fraction of the mile, the Company had demanded the sum of one halfpenny. The Company pleaded that the sum charged was a just and lawful charge for the journey.—*Held*, on demurrer, that the General Railway Act, 7 & 8 Vic., c. 85, applied to the present case; and that, inasmuch as by section 6 of that Act, the fare is to be measured by the number of miles actually travelled, without taking fractional distances into account, in the absence of any power in the Special Acts of the Company to charge for such distances, they had been guilty of an overcharge, and were liable to the present action.

Held also, that the 103rd General Rule respecting the obtaining of a Judge's certificate for full costs, where the amount recovered does not exceed £20, does not apply, where the cause is decided upon demurrer. C. P. Rice v. Dublin and Wicklow Railway Co. 160

RECEIPT.

See ACCORD AND SATISFACTION.

RECEIVER.

See LIMITATIONS, STATUTE OF.

546 REJECTION OF VOTE.

REJECTION OF VOTE BY DEPUTY.

See ELECTION.

RENEWABLE LEASEHOLD CONVERSION ACT.

A covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest; and, therefore, if his assignee acquires the inheritance, it is not bound by the covenant.

The order of the Court of Chancery for the execution of a fee-farm grant by a tenant for life, obtained in a petition proceeding against him, under the Renewable Leasehold Conversion Act, gives only the same effect to the grant as it would have had if made voluntarily by the same person, and is not conclusive against the remainderman (not being a party to the proceedings), as to the right of renewal.

H., being entitled to lands, under a lease, dated in 1769, for lives renewable, and also of other lands, under a lease of 1772, for two lives only, made a sub-lease in 1788 to K., of both the lands, at a bulk rent, for three lives, with a covenant for perpetual renewal. K.'s interest afterwards vested in T. H.'s interest subsequently came to R., who acquired also the reversion in fee in both the lands, and settled them upon himself for life, remainder to his son S. The several lives having expired, a fee-farm grant was afterwards made of all the lands by R. to T., under an order of the Master of the Rolls, upon a petition filed for that purpose against R., under the Leasehold Conversion Act. To this proceeding S. was not made a party. R. having died, S. now brought an ejectment.—*Held* (reversing the decision of the Exchequer), first, that S. was not bound by the covenant for renewal in the lease of 1788, so as to preclude him from recovering the lands comprised in the lease of 1772; and secondly, that the decision of the

SETTLEMENT.

Master of the Rolls did not conclude him as to the existence of the right of renewal of those lands. Ex. Ch. *Brereton v. Tuohy* 190

RIGHT OF TURBARY.

See LANDLORD AND TENANT, 1.

RIGHT TO CUT TURF, EXTENSION OF.

See LANDLORD AND TENANT, 2.

SALE OF GOODS.

See DEMURRER.

SATISFACTION.

See ACCORD AND SATISFACTION.

SECURITY FOR COSTS.

See PRACTICE, 3.

SET-OFF.

See PLEADING, 1.

SETTING ASIDE PROCEEDINGS.

See ALTERATIONS IN SUMMONS AND PLAINT.

SETTLEMENT.

Lands were conveyed to A and B, and their heirs, to have and to hold the same "from henceforth unto the said A and B, and the survivor of them, their heirs and assigns, to the only proper use and behoof of the said A and B, and the survivor of them, their and his heirs and assigns for ever." The settlement contained a power for C, at any time during his life, "by mortgage of all or any part of said lands," to raise £500. C having afterwards mortgaged the lands to D, in fee—*Held*, that, notwithstanding that A and B took at Common Law, and not under the Statute of Uses, the mortgagee, assuming the power to have been well exercised, acquired the legal estate in the lands.

Held also, that a conveyance in fee by C, to a lessee of the lands, in trust to pay head-rents and rentcharges, and then to retain the residue of the reserved rents until, by perception thereof, he should be repaid the amount of a loan, and interest, with a proviso

SEVERAL FISHERY.

that the grantor might avoid the deed, on payment of what was due, was a good execution of the above power to mortgage. *C. P. Gorman v. Byrne*
394

SEVERAL FISHERY.

A several fishery in the River M., which had been granted by the Crown, anterior to the Statute of Magna Charta, and had re-vested by forfeiture, was subsequently re-granted, in 1669, to Sir G. P., in fee-simple. A lease was afterwards made, in 1788, by the representatives of the grantee to a party through whom the plaintiffs claimed. The defendant having, at the trial of an action for disturbance of the plaintiffs' right, given evidence of the adverse user by him of a fishery within a portion of the fishery claimed by the plaintiffs, opposite the lands of S., for a period of sixty years, and upwards:—*Held*, that it was evidence from which the jury were at liberty to presume a grant by the owners of the original fishery to the defendant.

As a link in the plaintiffs' title, an ancient deed, made subsequent to the grant of the Crown, was read in evidence, whereby A and B professed to grant the fishery to C; and containing an indorsement, without date, to the effect that possession had been given by one of the grantors in the presence of the witnesses. No question having been made as to the document being genuine:—*Held*, that the indorsement was evidence of the fact stated therein. *C. P. Little v. Wingfield* 279

SHEEP-STEALING.

See BAIL.

SMALLER SUM, WHEN A SATISFACTION OF LARGER.

See ACCORD AND SATISFACTION.

SPECIFIC DEVISE.

See WILL, 2.

TOWNS, &c.

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SPECIFIC PERFORMANCE.

See LEASE, 2.

STAMP, WHEN AFFIXED.

See CHARTER-PARTY.

STATEMENT OF COUNSEL.

See LIBEL, 1.

STATUTES QUOTED.

3 & 4 Vic., c. 108, s. 140.

5 & 6 Vic., c. 82, s. 34.

12 Vic., c. 16.

16 & 17 Vic., c. 107.

17 & 18 Vic., c. 89.

18 & 19 Vic., c. 62.

19 & 20 Vic., c. 113, s. 87.

SUBSEQUENTLY ACQUIRED ESTATE.

See WILL, 1.

SUBSEQUENTLY ACQUIRED REAL ESTATE.

See WILL, 2.

SUBSTITUTED BILL.

See BILL OF EXCHANGE.

SUPERIOR COURTS.

See ACTION FOR PENALTIES.

SURRENDER.

See ACCORD AND SATISFACTION.

TENANCY IN COMMON.

See FISHERY.

TENANTRY ACT.

See LEASE, 2.

TITHES.

See LEASE, 1.

TOLL.

See CONSTRUCTION OF STATUTE.

TOWNS IMPROVEMENT (IR.) ACT 1854.

A watchman appointed by Commissioners under the Towns Improvement

C L

(Ireland) Act 1854 (17 & 18 Vic., c. 103) is not the deputy or servant of the Commissioners, so as to render them liable, as such, for his illegal conduct, such watchman not being appointed to perform any duty imposed upon the Commissioners, who, by appointing him, have discharged their duty in that respect, in carrying out the Act.

Semble.—Had the Commissioners acted personally, or indirectly abetted the watchman in his illegal conduct, they would have been personally liable. *Q. B. Frankleton v. Sherlock* 90

TRAVERSING ALLEGATIONS AS LAID.

See PLEADING, 2.

TURBARY.

See LANDLORD AND TENANT, 1, 2.

Where bog forms a portion of lands demised, the tenant is at Common Law entitled to turbary thereout, by way of estovers, for consumption upon the demised premises. *E. Howley v. Jebb* 435

UNASCERTAINED QUANTITY.

See LANDLORD AND TENANT.

USES, STATUTE OF.

See SETTLEMENT.

VESSEL'S DRAUGHT OF WATER.

See CONSTRUCTION OF STATUTE.

WILL.

See EJECTMENT.

MANORIAL LANDS.

1. W. D. F., in 1852, devised all his real and freehold estates in L. and T. (except such estates as were vested in him as mortgagee or trustee), to certain uses, with remainder to the use of J. F., for life, remainder to the first and other sons of J. F., in tail male. He then bequeathed certain pecuniary legacies to his younger son and his four daughters, payable out

of his personality, amongst which he enumerated a mortgage held by him on an estate in L. In case his personality should prove insufficient, he charged all his real and freehold estates, in aid of the personality, to the extent of £6000; but declared that all real and freehold property acquired subsequent to the will should be considered as the primary fund for the payment of the bequests to his son and daughters, but should be considered personality for that purpose only. Testator appointed J. F. residuary devisee, and subsequently died seised of real estates in L. and T. At the date of his will, he had been declared the purchaser, in the Incumbered Estates Court, of the estate in L., of which he had been mortgagee, and a conveyance was subsequently, and after the date of the will, made to him of that property. The testator afterwards made a codicil, revoking the legacy to his younger son, and stating that in all other respects he ratified and confirmed his said will.—*Held*, that a sufficient intention on the part of the testator appeared on the face of the will, that the subsequently acquired estate in L. should not pass under the devise to uses, and that the residuary devisee was entitled to same absolutely. *C. P. In re Farrer's Estate* 370

2. S. K., being seised in fee-simple of a several portion of the lands of C., devised same specifically to G. S. and his heirs. Subsequent to the date of her will, she purchased the other several portion of C., in fee. It appeared that both portions had originally formed one entire denomination, and, having come into the possession of tenants in common, had been apportioned between them in severality; but both portions continued to be known as the lands of C., although commonly called, in addition thereto, for the sake of distinction, by the names of their respective owners at the time of partition. R. B. was the residuary devisee of S. K.—*Held*, that

under the 1 Vic., c. 26, ss. 3 & 24, the lands subsequently purchased passed to G. S., the specific devisee of C., and not to the residuary devisee. C. P. *Strevens v. Bayley* 410

3. A testator, in 1783, devised fee-simple lands to A, for life, with remainder to the first son of A, for life, with remainder in tail male to the first and every other son of such first son, and their issue male successively, with a devise over in case A should die without leaving issue male of his body, lawfully begotten. The testator then limited similar devises of the same lands to B. and M., moietively, and to their respective eldest sons and their issue male; and, to prevent any misunderstanding of the said limitations to A, and his eldest son, for their respective lives, the testator declared his meaning to be, that in case such eldest son of A should die without issue male, then his real estates should go to his second, third, fourth and every other son of A successively, and to the first and every other son of such second, third, fourth and every other son of A; such second son of A and his issue male to be preferred to such third, fourth and other sons and their issue; and the like rules to be observed with respect to the second, third and other sons of B. and M. respectively; and in case either B. or M. should die without leaving issue male, the share of either so dying should go to the survivor, or, if she were dead, to her first and every other son, if she should leave issue male, under the same limitations as the testator had already annexed to the shares of B. and M. respectively, with devise over to the daughters of A, in case both B. and M. should die without issue male.

Held, that the limitations to the sons of A's sons being void for remoteness, by the application of the *cy-pres* doctrine, A took an estate for life, with remainder to his sons successively, in tail male, with remainder to B. and M., moietively, for life,

with remainder in each moiety to their sons respectively, in tail male, with cross remainders to B. and M., for life, with cross remainders in tail male.

Held also, that the word "issue," in the gift over, "in case A should die without leaving issue male," was to be read "such issue," as being referential to the objects of the prior devises, and not as signifying an indefinite failure of issue; and consequently that an estate tail could not be implied in A, B. or M.

A testator, in 1795, devised fee-simple lands to B. and M., in equal shares; "and in case B. should happen to die without issue," he devised B.'s moiety to her husband Y, for life, and to descend immediately, upon Y's death, to M. and her issue; and in case M. should happen to die "without issue," then her moiety "to descend, upon her death, to B. and her issue; and if B. had no issue, then to her husband Y, for life; and in case B. and M. should happen to die without issue," the testator devised the lands to H and his heirs, reserving thereout £10 a-year for life, to a servant of the testator.

Held, that B. and M. did not take, moietively, estates in fee-simple, with cross executory devises over, in tail; but that B. and M. took moietively estates tail, with cross remainders in tail, subject to Y's life estate in B.'s moiety, with ultimate remainder in fee to H.

"The case of *Forth v. Chapman* (1 P. Wms., 663), and other cases, decide that, when real and personal estate is given in a will by the same clauses and in the same terms, a construction may be given to the words *dying without issue*, or to similar expressions as regards the personal estate."—[*Per O'BRIEN, J.*]

In contemplation of the marriage of the nephew of B. (a married woman), a settlement, not acknow-

ledged or enrolled, pursuant to the 4 & 5 W. 4, c. 92, was executed by B. and her husband, of lands, in which B. had an estate tail. This settlement contained a covenant by B. and her husband to join in deeds of further assurance, in the event of the marriage; and by a deed of the same date as the marriage settlement, between B. and her husband, her said nephew, and the trustees of the marriage settlement, after reciting that, by indenture of even date, the lands were settled to the uses therein declared, with a covenant for further assurance, B. joined with her husband and her nephew, in conveying the lands, discharged of all estates tail,

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to the trustees, to the uses declared by the marriage settlement. The latter deed was duly acknowledged and enrolled.

Held, that the latter deed incorporated the marriage settlement by reference, and that B.'s estate tail was thereby barred, and the lands assured to the uses declared by the marriage settlement.

Vanderplank v. King (3 Hare, 1) approved of. Q. B. *Peyton v. Lambert*

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See EJECTMENT.

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ACQUIESCENCE. *See* EQUITABLE DEFENCE.

ACTION AND CROSS-ACTION.
In an action for freight, by A, and a cross-action against A for injury to the cargo by negligence, the Court refused to stay the former action, after judgment, on the terms of lodging the amount of freight in Court, to abide the result of the cross-action, though A was resident in England, and had no property in this country. Q. B. *Smith v. Adams* xxi

ACTION BY OFFICIAL MANAGER.

To an action by the official manager of the T. Joint-stock Bank, against the acceptor of a bill indorsed to the Bank, with a count for money lent, the defendant having pleaded that a previous action was brought "against the defendant *for the same cause*," in the Court of Exchequer, "*for the benefit of the said T. Bank, by one J. S., a public officer of the said Bank, which action is still pending*, the Court set aside the defence as embarrassing. Q. B. *M'Dowell v. Davys* xiii

AFFIDAVIT.

See PRACTICE, 3, 21.
SECURITY FOR COSTS, 1.
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AFFIDAVIT OF MERITS. *See* SECURITY FOR COSTS, 2.

APPEAL WITHIN FOUR DAYS. *See* PRACTICE, 14.

ASSAULTING PROCESS-SERVER.

Conditional order for attachment granted for an assault upon a process-server, while effecting service of a writ of summons and plaint. Q. B. *Carpenter v. Murtagh* iii

ATTORNEY'S COSTS. *See* STET PROCESSUS.

BAIL MOTION.

In bail motions, there must either be an affidavit of service of notice on, or an appearance on the part of, the Crown. Q. B. *Regina v. Roach* ix

BILL OF SALES ACT, 17 & 18 Vic., c. 55, s. 6.

The jurisdiction to enter a memorandum of satisfaction upon a bill of sale, under section 6 of the 17 & 18 Vic., c. 55, is peculiar to the Court of Queen's Bench; and a Judge of another Court, sitting in the Consolidated Chamber, cannot exercise it. Consol. Ch. *Marchbanks v. Fleming* xxix

BREACH OF AGREEMENT. *See* EQUITABLE DEFENCE.

BREACH OF CONTRACT.

To an action for the breach of a contract for the sale and delivery of coals, the defendant, in addition to a general traverse of the contract sued on, pleaded two special defences, in which he set forth an additional term, by which the contract was qualified, and which the plaintiff had omitted to

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state, and averred that, upon breach by the plaintiff of the contract so qualified, the defendant had, as he lawfully might, rescinded the contract.—*Held*, that the special defences were properly pleaded, and were not embarrassing.

Per Crampton, J.—Such special defences are unnecessary, inasmuch as evidence of the special matter may be given under the traverse of the contract; but the defendant nevertheless has the option, instead of relying solely on the traverse, to apprise the plaintiff of his real defence, by specially setting it forth upon the record. Q. B. *Kenny v. Taylor* lxxvi

CHARGING ORDER.

See Practice, 5.

CIVIL-BILL APPEAL.

An action of debt, for arrears of salary, to be paid out of poor-rate, does not lie against the Guardians of a Poor-law Union.

The proper remedy is by mandamus. Cir. Cas. *Bolton v. Guardians of Mallow Union*. ix

CONDITIONAL ORDER FOR ATTACHMENT.

See ASSAULTING PROCESS-SERVER.

CONDITIONAL ORDER FOR NEW TRIAL.

See DEATH OF PLAINTIFF AFTER VERDICT.

COSTS.

See Practice, 17.

COSTS, CERTIFYING FOR AT TRIAL.

Where, by a fatality, the Judge omits, at the trial, to certify, in order to entitle the plaintiff to costs, as required by the Common Law Procedure Amendment Act 1856, sec. 97, the Court will supply the omission. Q.B. *M'Alister v. Callan* x

DATE OF SERVICE, &c.

COSTS, SECURITY FOR.

See Practice, 8, 21.

1. The affidavit upon which the motion for security for costs is grounded must be made by the defendant himself, and not by his attorney, except under special circumstances. Consol. Ch. *Willans v. Paterson* xxix
2. The filing of his defence does not preclude a party, under the 52nd General Order 1854, from obtaining security for costs, upon his serving the opposite party with notice that such defence is filed without prejudice to the motion for security for costs.

Upon a motion for security for costs, it is sufficient if the affidavit of merits disclose a defence to part of the action. Consol. Ch. *United General Life Assurance Company v. Beale* xxx

COSTS, SECURITY FOR FUTURE.

Where husband and wife, natives of England, who came to this country in the service of the defendant, had jointly commenced an action against the defendant, and the husband, after a defence had been filed, had returned to England, as the defendant believed, permanently to reside there, a motion for security for future costs was granted, notwithstanding that the wife was resident within the jurisdiction, and stated in her affidavit that her husband intended to return to this country. Q. B. *Habgood v. Paul* xxxiii

COURT OF CHANCERY (IRELAND) REGULATION ACT 1850, s. 22.

See STAYING PROCEEDINGS AT LAW

DATE OF SERVICE OF PLAINT NOT INDORSED.

Where the date of service had not been indorsed upon a plaint, pursuant to the Common Law Procedure Act 1853, s. 31, leave was granted to take

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the plaint off the file, for the purpose of having it re-reserved. Consol. Ch. *Johnston v. Briscoe* **xxx**

DEATH OF PLAINTIFF AFTER VERDICT.

The plaintiff in an action having died after the trial of the cause, and a conditional order to enter a verdict, on a point reserved at the trial, having been obtained in the name of the plaintiff, without noticing his death, it appearing that the attorney was not, at that time, aware of his death; the Court ordered the conditional order to be discharged, without prejudice to such application as the personal representative of the plaintiff might be advised to make. Q. B. *Moore v. Browne* **xxv**

DEFENCE.

*See BREACH OF CONTRACT.
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DEFENCE SET ASIDE.

See PROMISSORY NOTE.

DEFENCE TO BREACH OF CONTRACT.

A plaint, in two counts, respectively alleged that on two different occasions the defendant hired the plaintiffs in London, to serve him as domestics at his residence in Ireland, and agreed that if he dismissed them he would supply them with travelling expenses back to London; and having averred performance of the contract by the plaintiffs, the plaint assigned as breach that the defendant dismissed the plaintiffs, and refused to supply them with such travelling expenses. The defence alleged that the two causes of action were one and the same, and that the defendant did not contract with the plaintiffs as alleged, but engaged them on the express terms that, if he should be obliged to dismiss them for misconduct, he should not furnish them with travelling expenses; and averred a dismissal for drunkenness, wherefore the defendant refused to furnish the plaintiff with such travelling expenses.

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Held, a good defence within the spirit of the Common Law Procedure Act, as putting in issue the real question, viz., what was the contract between the parties. Q. B. *Habgood v. Paul* **xxiii**

DEMURRER.

After a demurrer to a defence had been argued and disallowed, and judgment marked, the Court refused a motion by the plaintiff for leave to set aside the judgment for the defendant on the demurrer, and to take issue in fact on the defence, on the terms of paying the costs of such demurrer and judgment. Q. B. *M'Eniry v. Waterford and Limerick Railway Co.* **lxi**

DISCONTINUANCE.

See PRACTICE, 17.

DIVIDENDS IN BANKRUPTCY.

See GARNISHEE ORDER.

DOUBLE DEFENCES.

See PLEADING, 2.

EJECTMENT.

See PRACTICE, 6.

EJECTMENT FOR NON-PAYMENT OF RENT.

Leave granted to substitute service of an ejectment for non-payment of rent, under the Common Law Procedure Act 1853, s. 34, by serving the under-tenants in possession of the premises, the former attorney for the defendant, the superintendent of the defendant's studies as a student of divinity, and by posting a letter addressed to the defendant at his last known place of residence. Q. B. *Hutton v. Nolan* **xi**

EMBARRASSING DEFENCE.

See PRACTICE, 2.

EMBARRASSING PLAINT, SETTING ASIDE.

The summons and plaint stated that the plaintiff, a domestic servant, had obtained, from the persons by whom she

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had been employed, written certificates, commonly called discharges ; and that while she was so possessed of such certificates, the defendants hired her to act as such domestic servant, and required her to deliver to them said certificates on entering into said employment, to be retained in their possession while the plaintiff remained in said employment, and which certifies the plaintiff did so deliver to the defendants ; and that while said certificates were in the possession of the defendants as aforesaid, the defendant C. Dillon wrote upon each of said certificates, before re-delivering the same to the plaintiff, the following words :— “ Margaret Glynn lived with me for one fortnight ; any lady requiring her character should apply to me.—C. D.” ; and that said words were maliciously, wrongfully and unjustly written on said certificates, to signify that the plaintiff had been dismissed from the defendants’ employment for some impropriety, by reason whereof the said certificates became defaced, damaged and wholly useless to the plaintiff ; and the plaintiff had been prevented from obtaining employment as a domestic servant ; and several persons, solely by reason of the premises, had refused to employ her, whereby she was deprived of the means of her livelihood.

An application to set aside this summons and plaint as embarrassing refused, it being open to the defendants to traverse the acts complained of, or to demur. Consol. Ch. *Glynn v. Dillon* lxxi.

ENTERING MEMORANDUM OF SATISFACTION OF JUDGMENT.

See PRACTICE, 10.

EQUITABLE DEFENCE.

To an action on an agreement, not under seal, for a penal rent for ploughing up 2a. 3r. 7p. of land, the defendant pleaded, by way of equitable defence, that the agreement was made between the plaintiffs, trustees for A., and the defendant, and was prepared

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by B, who was the land agent of the plaintiffs, and their attorney in the present action. The defendant then averred that A, the *cestui que trust*, who was beneficially entitled to the land, and B, had seen the defendant break up the lands in due course of husbandry, and had approved of, and acquiesced in, such breaking up of the land.—*Held*, that this defence was embarrassing, and not an answer to the action. Q. B. *Somerville v. Sheals* lvi.

EXAMINATION OF WITNESSES UNABLE TO ATTEND AT TRIAL, FROM ILL HEALTH.

Upon an application to examine a witness, who is unable from illness to attend at the trial of the cause, the certificate of a surgeon, whose handwriting and signature are verified by the affidavit, is sufficient. Consol. Ch. *Walker v. Keegan* lxxv.

EXECUTION STAYED UNTIL JUDGMENT IN EXCHEQUER CHAMBER, WITHOUT BAIL IN ERROR BEING GIVEN.

See PRACTICE, 4.

FALSE AND FRIVOLOUS PLEA.

A plea, proved by letters of the defendant himself to be false and frivolous, and which, upon the face of it, is calculated to embarrass and delay the action, and is also vicious in point of law, will be set aside, with costs, and leave given to mark judgment. Consol. Ch. *Armstrong v. Evans* xxviii.

FINALITY.

See DEMURRER.

FOREIGNER.

See PRACTICE, 8.

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See PRACTICE, 13.

A dividend payable by the assignees of a bankrupt to a creditor of the bankrupt, who had proved his debt in the

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Court of Bankruptcy, cannot be attached, under the Common Law Procedure Act, 1856, s. 63, by a judgment creditor of the person to whom such dividend is payable.

Where cross notices have been served, to show cause against, and to make absolute, the summoning portion of a garnishee order, the garnishee showing cause is to begin. Q. B. *Gilmour v. Simpson* xxxviii

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INTERROGATORIES BEFORE DEFENCE FILED.

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See PRACTICE, 12.

JUNIOR BAR.

See PRACTICE, 7.

LEAVE TO MARK JUDGMENT.

See PRACTICE, 3.

PROMISSORY NOTE.

LEAVE TO PLEAD AND DEMUR.

Leave given to plead and demur, where the result of the demurrer, if successful, would be to put a stop to the action altogether, the parties being

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put under terms to argue the demurrer first. Q. B. *Knight v. Lynch* lxvii

LEAVE TO TAKE PLAINT OFF THE FILE, TO BE RE-SERVED.

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See PRACTICE, 3.

MASTER AND SERVANT.

See DEFENCE TO BREACH OF CONTRACT.

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See BILL OF SALES ACT, 17 & 18 VIC., c. 55, s. 6.

NEW TRIAL.

The Court will not grant a conditional order for a new trial, on the ground that, at the trial, one of the parties declined to read the evidence of one of his own witnesses, taken abroad, under a commission, it not being obligatory on him so to do, and it being open to the other side to read such evidence, or any portion of it which he thinks fit. Q. B. *Maxwell v. Newton* xxxiii

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See SPECIAL JURY UNDER OLD SYSTEM. VIEW JURY.

NOTICE OF FILING SUMMONS AND PLAINT, SUBSTITUTION OF SERVICE OF.

Leave granted to substitute service of the notice of filing the summons and plaint, the defendant having been duly served with the plaint, but having left Ireland immediately afterwards. Consol. Ch. *Byrne v. Sherlock* xxxii

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NOTICE OF TRIAL.

See PRACTICE, 16.

PARTY AT TRIAL DECLINING
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COMMENCED.

*See COSTS, SECURITY FOR FU-
TURE.*

PLEADING.

*See ACTION BY OFFICIAL MAN-
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DEFENCE TO BREACH OF CONTRACT.

1. To a count by the assignees of a bankrupt, for money had, a traverse and a plea of payment, under s. 328 of the Irish Bankrupt and Insolvent Act 1857, allowed; but a plea of set-off, under s. 251, refused. Q. B. *Murphy v. Cuffe* xiii
2. In an action for board, lodging, &c., supplied by the plaintiff to a child of the defendant, at his request, a defence that no board, lodging, &c., were supplied by the plaintiff to any child of the defendant, at his request, is not double. E. *Crossan v. John-
ston* xlvi

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1. A defendant cannot demur and re-join, under ss. 48 or 59 of the Common Law Procedure Act, 1853. Q. B. *Dunne v. Gumley* ii
2. To an action on a bill of exchange, by indorsee against acceptor, a defence of want of consideration, and an agreement not to sue the defend-

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ant during the pendency of certain disputes between him and his nephew, set aside as embarrassing. Q. B. *Colles v. Coneys* iii

3. Liberty to mark judgment, without the usual affidavit of service, granted, the defendant not having appeared, pursuant to his undertaking, to accept service of the summons and plaint, and appear to the action. Q. B. *Hall v. Rynd* iv
4. Upon the argument of a demur-
rer, the Court being equally divided in opinion, and one Judge having withdrawn his judgment *pro forma*, in order to admit of an appeal, execu-
tion on the judgment was stayed, until the decision of the Court of Exchequer Chamber should be had on a suggestion in error, without bail in error being given under the Common Law Procedure Act (*Ir.*) 1853, s. 2. *Percival v. Dunne* v
5. Although the Court of Queen's Bench does not consider it imperative upon a party seeking for a charging order, under s. 135 of the Common Law Procedure Act, 1853, to actually issue execution, deeming it sufficient if he be in a position to do so, yet it considers it more prudent that execution should have actually been issued at the time of making the application. Q.B. *Fletcher v. Egan* v
6. The name of a defendant, unneces-
sarily made a party to an action of ejectment on the title, struck out, he being dead at the time of service of such ejectment. Q. B. *Douglas v. Moore* vi
7. The Court will not permit Senior Counsel to settle issues without a Junior. Q. B. *Dunne v. Gumley* vi
8. The Court will not require security for costs to be given by a plaintiff, who is a foreigner, and usually resident abroad, if, at the time, he is actually in this country. The fact of the plaintiff having a foreign domicile is immaterial. Consol. Ch. *Allain v. Chambers* vii

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9. Assignees of an insolvent ordered to elect, either to discontinue the action commenced before the insolvency, or to continue it, pursuant to the Common Law Procedure Act 1853, section 162. Q. B. *Macnamara v. Lynch* xi
10. Where a party, without having taxed his costs, issues execution upon a judgment marked only for the amount found for him by verdict, he thereby waives his claim to the costs; and the Court, upon being satisfied that the amount of the judgment has been fully paid, will order a memorandum of satisfaction to be entered, pursuant to the Common Law Procedure Act, 1853, s. 144. Q. B. *Barnett v. Heron* xix
11. Leave granted to have a case tried by special jury, although the plaintiff had omitted, within the prescribed time, to give the defendant notice of his intention to have the case so tried. Q. B. *Cooper v. Owen* xx
12. A rule to stay the plaintiff's proceedings until he give security for costs must be vacated before the defendant can apply to enter a rule for a nonsuit or dismiss. E. *Fielden v. Donagh* xlvi
13. The proceeds of an execution may be attached in the Sheriff's hands for debt due by the execution creditor. E. *Murray v. Simpson* xlvi
14. Liberty to serve notice of appeal to the Court of Error, after the expiration of the regular period of four days, upon the ground that it was impossible within the four days to obtain the sanction of a Master in Chancery, for the prosecution of the appeal (the action having been brought by his direction), was refused, there having been already two trials, and there being some doubt whether the question in the case would be open in the Court of Error. —*Quare*, whether the Court had jurisdiction to grant the application? E. *Norris v. Lawder* xlvii
15. The venue in an action was stated in the margin of the summons and plaint as "city of Dublin."—*Held*, that the venue was sufficiently stated. E. *Courtenay v. Blake* xlix
16. Where a plaintiff served notice of trial for the Consolidated Court, and the defendant made no objection to the notice, but appeared at the trial, and objected that the Judge had no jurisdiction to try the case, the Court (the last day for serving notice of trial having passed) allowed a notice of trial served on that day to stand for the Sittings after Term. E. *Waldron v. Parrott* i
17. Where the plaintiff discontinues, the defendant will be entitled to costs, although the summons and plaint has not been filed. E. *Moylan v. Healy* lii
18. The Court will not permit a writ of *subpoena ad testificandum* to issue, to compel the attendance of a witness resident out of the jurisdiction, unless it be shown that the evidence cannot be had under a commission, or otherwise than by the personal attendance of the witness. E. *Dunne v. Lewis* liv
19. The affidavit to ground a motion for liberty to deliver interrogatories should state the circumstances as to which discovery is sought. E. *Naghten v. Midland Great Western Railway Company* lv
20. If a question arise at Nisi Prius, as to the liability of a document to stamp-duty, the Judge may reserve the question for the opinion of the Court, and order a conditional lodgment of the stamp-duty and penalty. Such a lodgment is not a determination of right in favour of the Crown. E. *Herbert v. Beyhan* lv
21. The affidavit to ground a motion for security for costs in this Court must allege some facts from which the existence of a defence may be inferred; but the Court will not hear any evidence to test the truth of

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such an allegation. *E. Sheppard v. Beamish* lix

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Leave granted to the defendants (a public company), on the affidavit of their attorney, to deliver interrogatories to the plaintiff before defence filed, and the time of pleading extended until the interrogatories should be answered. *Consol. Ch. McKenna v. Chester & Holyhead Railway Company* xxvi

PROMISSORY NOTE.

To an action on a promissory note, by payee against maker, the defendant having pleaded, "that he did not promise as in the plaint alleged," the Court set aside the defence, as contravening the Common Law Procedure Act 1853, s. 70.

The Court also gave the plaintiff leave to mark judgment, and refused to allow the defendant to amend his defence, it appearing by affidavit that the whole amount claimed by the plaint was due. *Q. B. Smyth v. Scott* xxxx

REMOVING INDICTMENT BY CERTIORARI.

The Court will grant a *certiorari* to

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remove an indictment for obstructing a public highway, from the Assizes, it appearing to be necessary to the ends of justice that there should be a view of the *locus in quo*. *Q. B. The Queen v. Magill* lxii

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See PRACTICE, 7.

SERVICE OF SUMMONS AND PLAINT.

Service of the summons and plaint upon a servant of the defendant, near his dwelling-house, not sufficient under the Common Law Procedure Act 1853, s. 32; but it appearing, by affidavit, that the process-server had been threatened with violence, and that a letter had been received from the defendant, in which he admitted the plaintiff's claim, and the receipt of the copy of the summons and plaint, service allowed to be substituted, by a letter sent through the post, directed to the address from which the defendant's letter came. *Q. B. Grady v. Kearney* xliv

SETTLING ISSUES.

See PRACTICE, 7.

SHAM PLEA SET ASIDE.

If a plea appears by affidavit to be palpably false, it is within the spirit of the Common Law Procedure Act 1853, s. 88, and the Court will grant a conditional order to set it aside, with liberty to mark judgment. *Q. B. Leathly v. Carey* i

SLANDER.

To an action for slander, the defendant

SPECIAL DEFENCES.

pleaded that, suspecting and believing that the defendant had, on previous occasions, and on the occasion in question, been guilty of fraud in the course of his trade, and had thereby cheated the defendant; and that the defendant, for the purpose of having the fraud inquired into and exposed, spoke the words complained of, *bona fide*, believing them to be true, and without malice, and did not, in speaking the said words, use language stronger than was necessary, nor did he speak or publish the words in the presence of more persons than necessary.

This defence was set aside as embarrassing, because it did not set forth the facts which the defendant relied upon as the grounds for his belief. Consol. Ch. *Hennessy v. Morgan* lxix

SPECIAL DEFENCES.

See BREACH OF CONTRACT.

SPECIAL JURY.

See PRACTICE, 11.

SPECIAL JURY UNDER THE OLD SYSTEM.

An application to strike a special jury, under the old system, must, in all the Courts, be on notice. Consol. Ch. *Grome v. Blake* lxviii

STAMP-DUTY, LIABILITY TO.

See PRACTICE, 20.

STAYING PROCEEDINGS.

See ACTION AND CROSS ACTION.

STAYING PROCEEDINGS AT LAW.

A, having brought an action of debt against B, executrix of C, and having afterwards presented a cause petition under the 15th section of the Chancery Regulation Act, for the administration of C's estate, upon which the usual order of reference was made, without notice to B, upon the

VENUE.

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same day on which B filed a defence to the action; the Court, upon the application of the defendant, stayed the action, under the 22nd section of the Chancery Regulation Act, the leave of the Master not having been obtained, as required by that section.

Sembler.—A, upon presenting the cause petition to the Court of Chancery, ought to have apprised B, by notice, of that fact, and of his intention not to proceed with the action. Q. B. *Sterne v. Jones* xxxv

STET PROCESSUS.

Where the defendant, without the concurrence of her attorney, compromised the action, the Court, at the instance of the plaintiff, entered a *stet processus* upon the order to proceed to trial, obtained by the defendant's attorney, under section 106 of the Common Law Procedure Act 1853. Consol. Ch. *Greene v. Fitzpatrick* xxxi

STRIKING OUT NAME OF DEFENDANT.

See PRACTICE, 6.

SUBSTITUTION OF SERVICE.

See EJECTMENT FOR NON-PAYMENT OF RENT.

SERVICE OF SUMMONS AND PLAINT.

WRIT OF REVIVOR.

SUBPOENA AD TEST.

See PRACTICE, 18.

TAXATION.

See PRACTICE, 17.

TRAVERSE.

See BREACH OF CONTRACT.

VENUE.

See PRACTICE, 15.

VIEW JURY.

In all the Courts the application for a view jury must be on notice. Consol. Cham. *Irwin v. Lattimer* lxxi

WAIVER OF COSTS.

See PRACTICE, 10.

WITNESS RESIDENT OUT OF JURISDICTION.

See PRACTICE, 18.

WRIT OF REVIVOR.

Leave granted to substitute service, under the Common Law Procedure Act 1853, s. 34, of a writ of revivor of a judgment obtained against three conusors, two of whom had been duly served, it being found practically impossible to serve the third conusor, whose residence was not known, he having emigrated to America shortly after the recovery of the judgment. Q. B. *Harris v. Nipe* xiii



